

**BEFORE THE COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND  
SITTING AS THE DISTRICT COUNCIL FOR THE MARYLAND-  
WASHINGTON REGIONAL DISTRICT IN  
MONTGOMERY COUNTY, MARYLAND  
Office of Zoning and Administrative Hearings  
Stella B. Werner Council Office Building  
100 Maryland Avenue, Room 200  
Rockville, Maryland 20850  
(240) 777-6660**

**IN THE MATTER OF:**  
**NOYES LANE, LLC**  
Applicant

Joseph Alfandre  
George Myers  
Curt Schreffler  
Dusty Rood  
Craig Hedberg  
Dave Ager

For the Application

C. Robert Dalrymple, Esquire  
Anne C. Martin, Esquire  
Attorneys for the Applicant

\*\*\*\*\*

Martin Klauber, Esquire  
Peoples Counsel

Neither in Support nor Opposition

\*\*\*\*\*

Cheryl Gannon  
Ray Alvarez  
Sarah Brookhart  
Cynthia Greer  
Susan Stamm

Community Participants in the Hearing

\*\*\*\*\*

Before: Martin L. Grossman, Hearing Examiner

Zoning Application No. G-817

**HEARING EXAMINER'S REPORT AND RECOMMENDATION**

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**I. EXECUTIVE SUMMARY**

Applicant:	Noyes Lane, LLC
LMA No. & Date of Filing:	G-817, filed November 12, 2003
Zoning and Use Sought:	Zone: R-T 12.5 Use: 26 Units (23 Single Family Townhouses plus 3 Existing Single Family Homes)
Current Zone and Use:	Zone: R-60 Current Use: Five Single Family Homes on Nine Lots
Location:	Georgia Avenue and Noyes Drive in Silver Spring
Applicable Master Plan:	<i>North &amp; West Silver Spring Master Plan</i>
Minimum Tract Required:	20,000 square feet
Acreage to be Rezoned:	Approximately 2.7 acres (116,899 sq. ft.)
Right-of-Way to be dedicated:	20 foot right-of-way along Georgia Avenue – final amount to be determined at Subdivision
Density Permitted in RT-12.5 Zone:	12.5 units per acre = 33 Dwelling Units here ( 2.7 acres X 12.5 = 33.75)
Density Planned:	9.7 per acre ( <i>i.e.</i> , 26 Dwelling Units on 2.7 acres)
Bldg. Coverage Allowed/Planned:	35% Maximum (40,915 sq.ft.) / 24% planned (28,145 sq.ft.)
Green Space Required/Planned:	50% required(58,450 sq.ft.) / 61% planned (71,057 sq.ft.)
Parking Spaces Required/Planned:	52 required (2 spaces per unit) / 61 planned
Building Height Limits:	35 feet maximum allowed / 35 feet planned
Traffic Issues:	Traffic concerns raised by the neighbors
Storm Water Drainage:	Storm water management is a great concern of the neighbors. It will be provided on site, and plans will be finalized at Site Plan and Subdivision Review
Environmental Issues:	Preservation of a specimen tulip poplar tree required by Technical Staff and agreed to by Applicant is opposed by the People's Counsel
Consistency with Master Plan:	Project is consistent with purpose and recommendations of the <i>North &amp; West Silver Spring Master Plan</i>
Neighborhood Response:	Some Opposition; some Support
Planning Board Recommends:	Approval
Technical Staff Recommends:	Approval
Hearing Examiner Recommends:	Approval

## II. STATEMENT OF THE CASE

Application No. G-817, filed on November 12, 2003 by Applicant Noyes Lane, LLC, requests reclassification from the R-60 Zone to the R-T 12.5 Zone of 2.7 acres of land known as Parts of Lots 1- 4, Block 4 (north of Noyes Drive), and Parts of Lots 7-11, Block 3 (south of Noyes Drive), in the Woodside Subdivision (13<sup>th</sup> Election District). The site is located at 9012, 9008 & 9006 Georgia Ave and 1403 Noyes Drive in Silver Spring. The application was filed under the Optional Method authorized by Code § 59-H-2.5, which permits binding limitations with respect to land use, density and development standards or staging. Applicant proposes to build a development called “Woodside Courts” that includes twenty-three new townhomes and preserves three of the existing single-family detached homes.

The application was initially reviewed by Technical Staff of the Maryland-National Capital Park and Planning Commission (“M-NCPPC”) who, in a report dated June 17, 2004, recommended approval.<sup>1</sup> The Montgomery County Planning Board (“Planning Board”) considered the application on June 17, 2004 and, by a vote of 4 to 0, with one abstention, recommended approval.<sup>2</sup> A public hearing was convened on June 28, 2004, at which time the Applicant presented evidence and testimony in support of the application. Five members of the community testified at the hearing, one in support and four in opposition.<sup>3</sup> Martin Klauber, the People’s Counsel also participated, but did not call any witnesses. The hearing was completed on June 28, and the record was scheduled to close on July 16, 2004, following additional filings by the Applicant. It was, however, reopened on July 26, 2004, for ten days to receive a letter from Sarah Brookhart, a

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<sup>1</sup> The Technical Staff Report is quoted and paraphrased frequently herein.

<sup>2</sup> The Planning Board approval assumed four additional binding elements not present in the final Schematic Development Plan. They were dropped by Applicant after objection from the People’s Counsel that their specificity defeated the purpose of the “Optional Method,” which should leave such details to Site Plan and Subdivision review. Nevertheless, Applicant has agreed to include these elements and additional concessions at Site Plan (Exhibit 62(a)).

<sup>3</sup> The supporting community participant, Ray Alvarez, appeared on behalf of a number of neighbors, and the Woodside Town Community Association, which represents 24 townhomes immediately to the north of the proposed development (*i.e.*, the Ottawa Place Townhomes) adopted his testimony. One of the three opposing community participants, Susan Stamm, appeared on behalf of the Woodside Civic Association

community participant, and any comments thereon. After some responses to Ms. Brookhart's letter were filed, the record closed again on August 5, 2004. The record was reopened on September 7, 2004, solely to allow in a corrected Declaration of Covenants (Exhibit 70(a)).

### **III. FINDINGS OF FACT**

For the convenience of the reader, the findings of fact are grouped by subject matter.

Where there are conflicts in the evidence, these conflicts are resolved under the preponderance of the evidence test.

#### **A. Subject Property**

The subject property consists of 2.7 acres (116,899 sq.ft.) of land located on the west side of Georgia Avenue, north and south of Noyes Drive, on the eastern edge of the Woodside neighborhood in Silver Spring. Georgia Avenue conveys major commuter traffic volumes past the site and separates the residential neighborhoods of Woodside and Woodside Park, which are both stable and mature neighborhoods. The subject property is located approximately three quarters of a mile south of the Capital Beltway (I-495) and a half-mile north of the Silver Spring Central Business District.

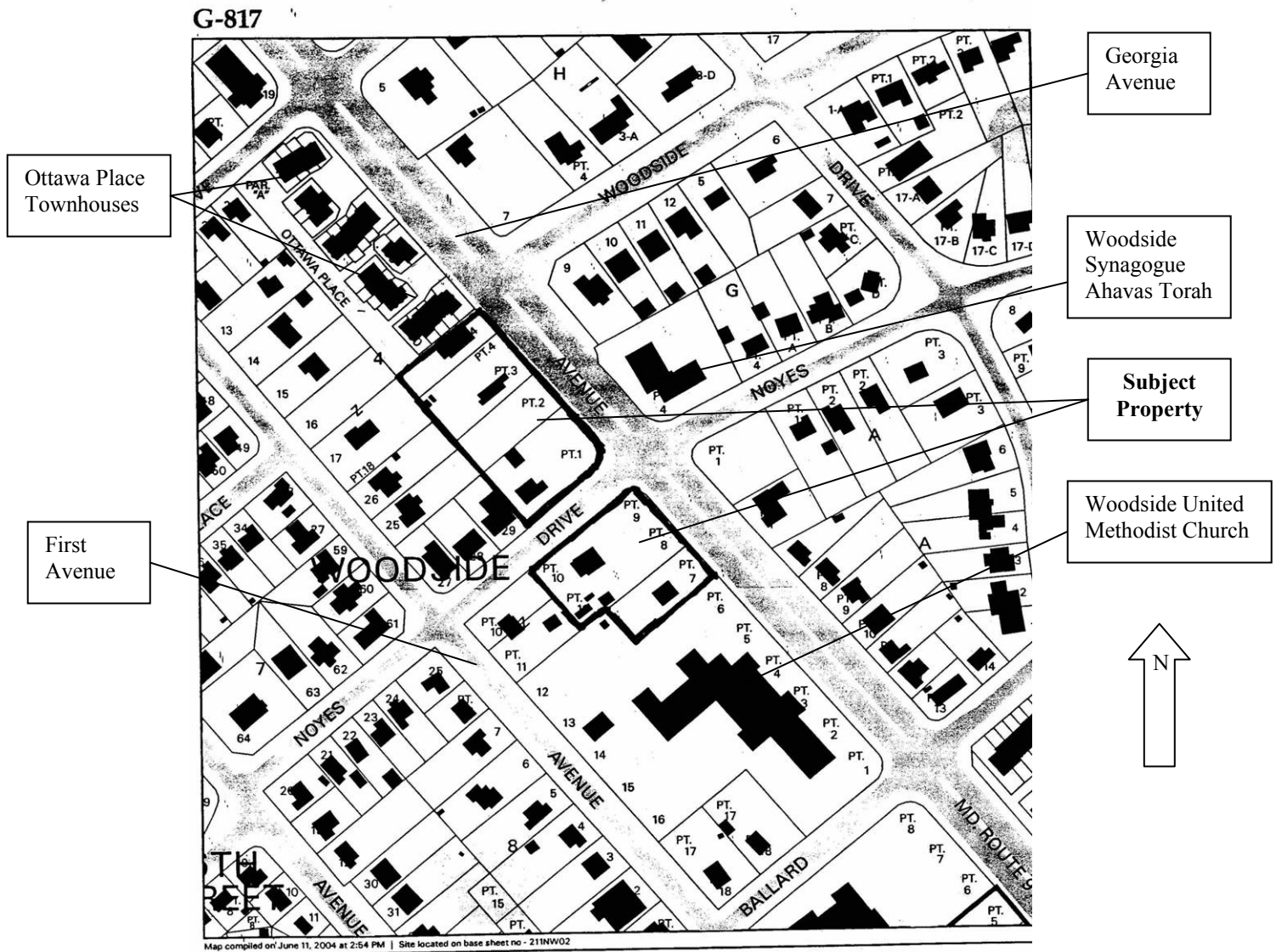
The Property has approximately 568 feet of road frontage along Georgia Avenue, 218 feet of frontage on the south side of Noyes Drive and 350 feet of frontage on the north side of Noyes Drive.<sup>4</sup> Slopes are gentle throughout the site with scattered pockets of moderate to steep slopes. Exhibit 10 (Applicant's "Planning, Land Use & Civil Engineering Report"). The site is comprised of nine individual lots containing five single-family dwellings, three fronting on Georgia Avenue and two fronting on Noyes Drive. The Property is adjacent to townhouses on Ottawa Place in the R-T 12.5 zone to the north, single-family residential dwellings in the Woodside neighborhood (R-60 zone) to the west and the Methodist Church of Woodside in the R-60 zone to the south. The

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<sup>4</sup> The Hearing Examiner's figures are derived from the revised Schematic Development Plan (Exhibit 62(d)) since the figures given on page 1 of Applicant's "Planning, Land Use & Civil Engineering Report" appear to be in error.

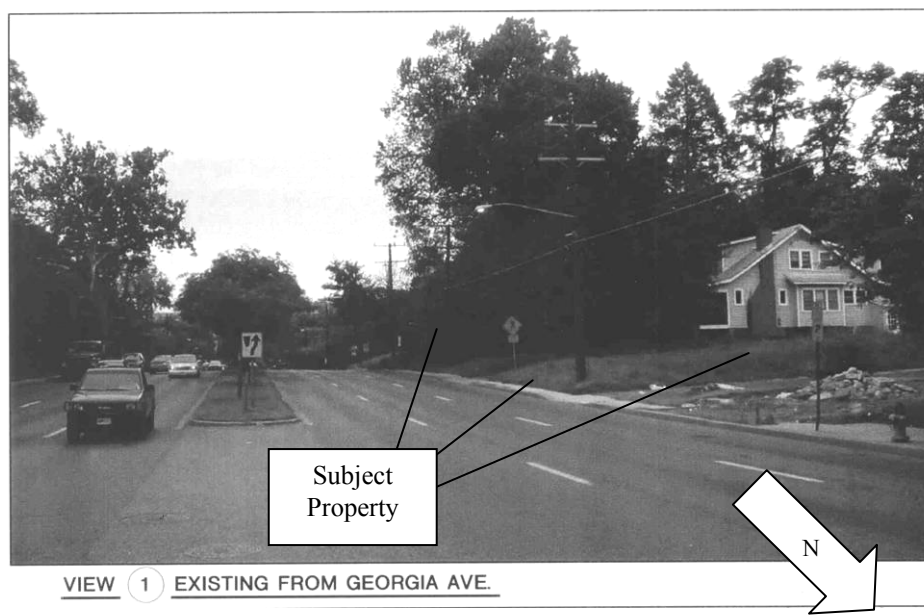
Woodside Synagogue Ahavas Torah and single-family homes in Woodside Park (R-60 zone) are located across Georgia Avenue to the east. Exhibit 10 and the Technical Staff Report (Exhibit 33).

The general location and shape of the subject property are shown on the area map below, from the Technical Staff Report.



Currently, the property is occupied by five single-family homes. The two northernmost homes (bungalows) will be demolished if the application is approved. Of the three remaining homes, the southernmost home will be relocated from Georgia Avenue to Noyes Drive, and the

other two will remain in place. Construction improvements will be made to these three remaining homes in accordance with an Historic Area Work Permit to be approved by the Historic Preservation Commission. Woodside is identified on M-NCPPC's Locational Atlas of Historic Sites, however it is not presently an historic district. Some sense of the site is conveyed by the following photograph, which portrays a portion of the property from Georgia Avenue, looking south (Exhibit 9(a), View 1).



The five houses currently on the site are depicted below in an excerpt from Exhibit 7. The locations of these numbered houses are shown on the following page in the "Existing Site Plan," also from Exhibit 7. Houses numbered 1 and 2 will be demolished; 3 and 4 will be retained in their present locations; and house numbered 5 will be moved to Noyes Drive.



1 EXISTING HOUSE  
SCALE: N.T.S.



2 EXISTING HOUSE  
SCALE: N.T.S.



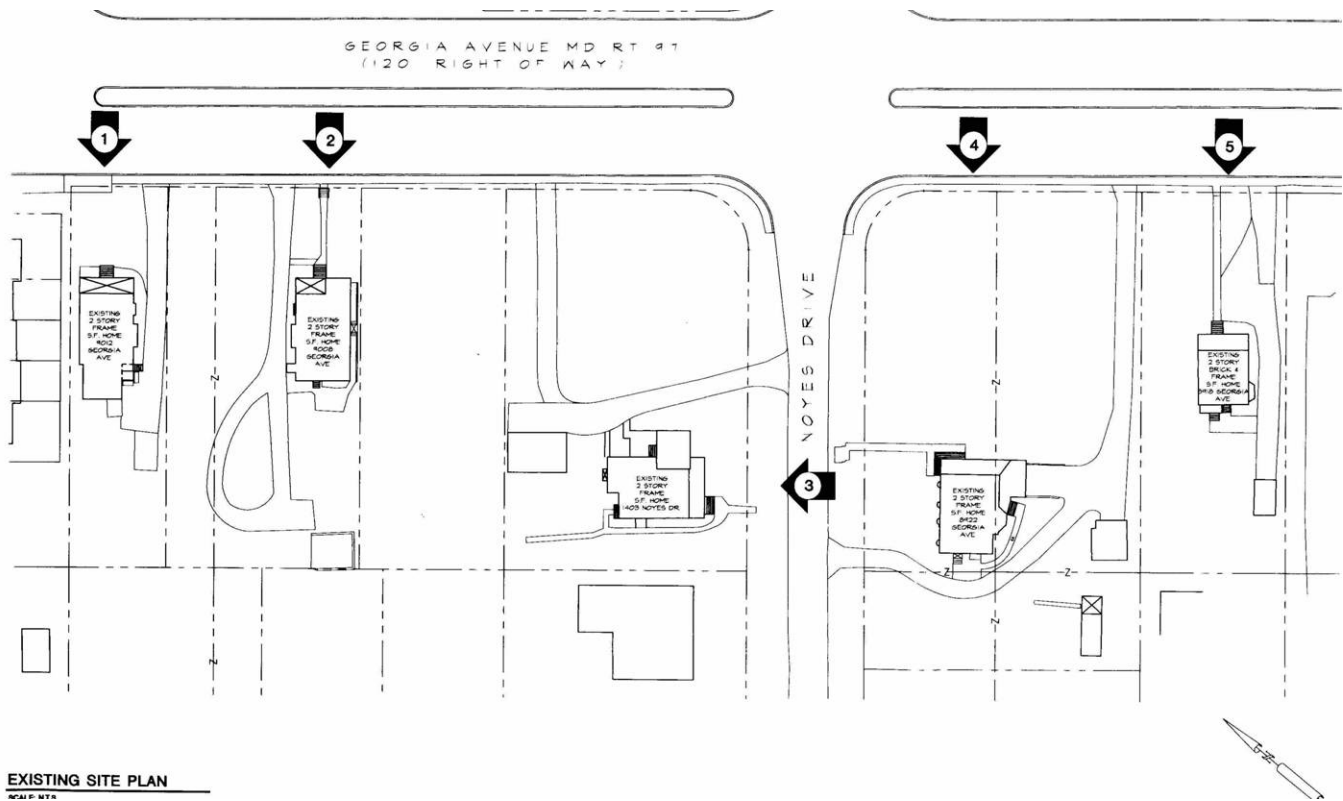
3 EXISTING HOUSE  
SCALE: N.T.S.



4 EXISTING HOUSE  
SCALE: N.T.S.



5 EXISTING HOUSE  
SCALE: N.T.S.

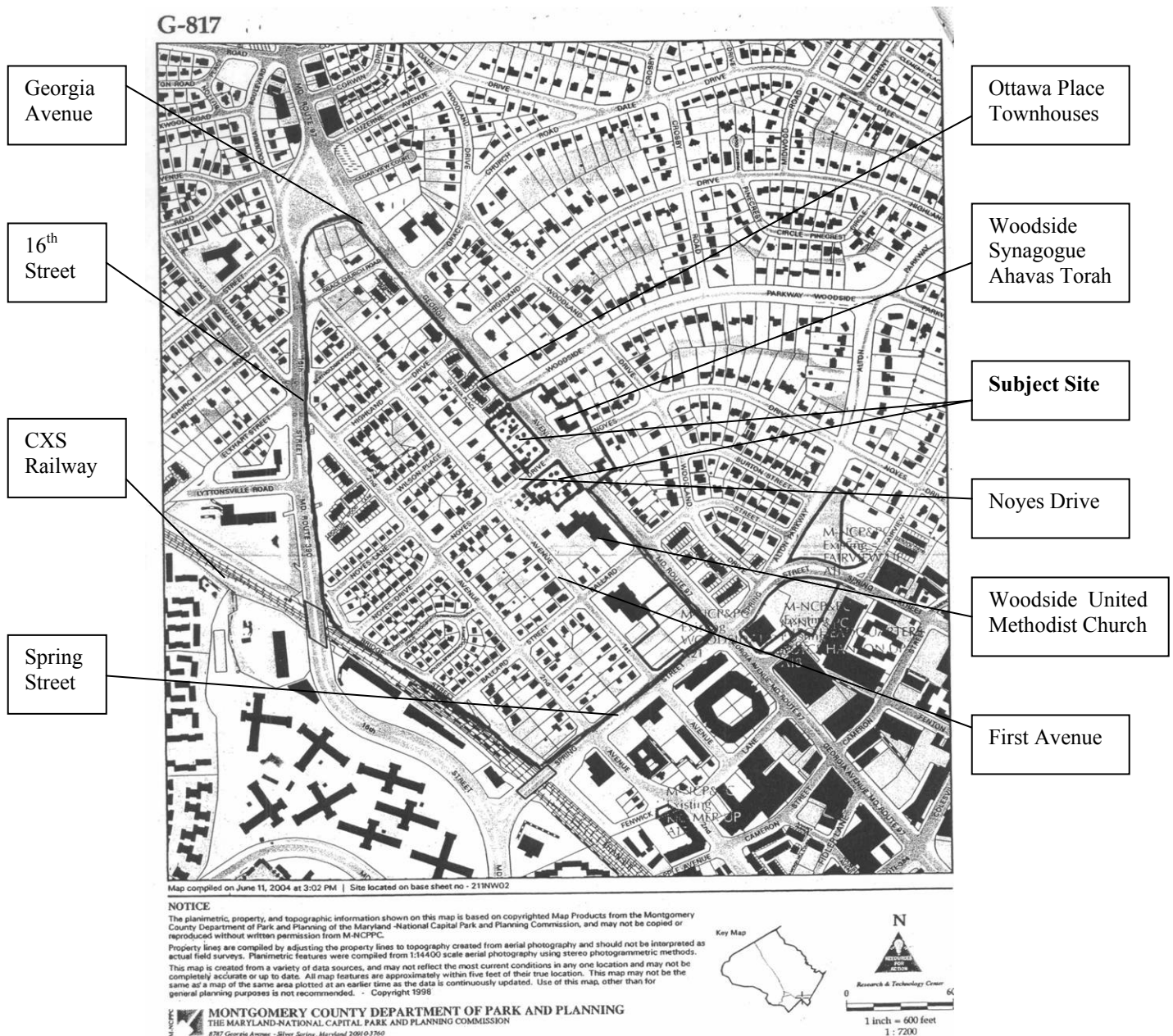


## B. Surrounding Area

The surrounding area must be identified in a floating zone case so that compatibility can be evaluated properly. The “surrounding area” is defined less rigidly in connection with a floating zone application than in evaluating a Euclidean zone application. In general, the definition of the surrounding area takes into account those areas that would be most directly affected by the proposed development. Technical Staff recommends adopting the master plan delineation of the Woodside neighborhood as a definition of the surrounding area for this application, with the addition of the lots across Georgia Avenue in Woodside Park that directly face the site. Staff’s rationale is that “the central location of Noyes Drive in Woodside and access to Georgia Avenue makes this site prominent to the Woodside neighborhood, particularly lots that are located south of Highland Street, east of Second Avenue and north of Ballard Drive. The Woodside neighborhood is closely knit and has a strong identity reinforced by an active civic association.” Moreover, the site fronts on Georgia Avenue, “which presents a clear division.”



The Hearing Examiner accepts the recommendation of the Technical Staff, and designates the surrounding area (*i.e.*, the Woodside neighborhood, for the most part) as that area bounded by Spring Street and the CSX Railroad tracks to the south, 16<sup>th</sup> Street to the west and Georgia Avenue to the east (except that in the area directly opposite the site, the boundary includes the lots directly across Georgia Avenue). Applicant's land planning expert, Dave Ager, also accepted Technical Staff's definition of the surrounding area. Tr. 214. The designated surrounding area for the subject application, as outlined by the Hearing Examiner, can be seen below on the vicinity map from Technical Staff's report.



Technical Staff describes the Woodside and Woodside Park neighborhoods, which are separated by Georgia Avenue, as “stable and mature inner-ring neighborhoods.” The surrounding land uses are a mixture of residential and institutional, with little developable land remaining. In the immediate vicinity of the site, a church (Woodside United Methodist) is located to the south of the property; townhomes exist to the north, and single-family detached dwellings exist to the west. Across Georgia Avenue to the east, a temple (Woodside Synagogue Ahavas Torah) and two residences face the property. There is one other church in Woodside (First Church of Christ, Scientist) and a Satellite Office for Montgomery County Department of Social Services. The surrounding area is mostly comprised of existing homes with little vacant land. According to Technical Staff, approximately 74% of the residential uses in the surrounding area are single-family detached dwellings, and the remaining 26% are townhomes.

### **C. Zoning History**

The subject property was classified under the R-60 Zone in the 1954 Regional District Zoning. The R-60 Zone was reaffirmed by Sectional Map Amendment (SMA) G-134 and SMA G-787, pursuant to the *North and West Silver Spring Master Plan*. The approved and adopted Master Plan does anticipate RT local map amendment proposals along Georgia Avenue when assemblage occurs (page 21).

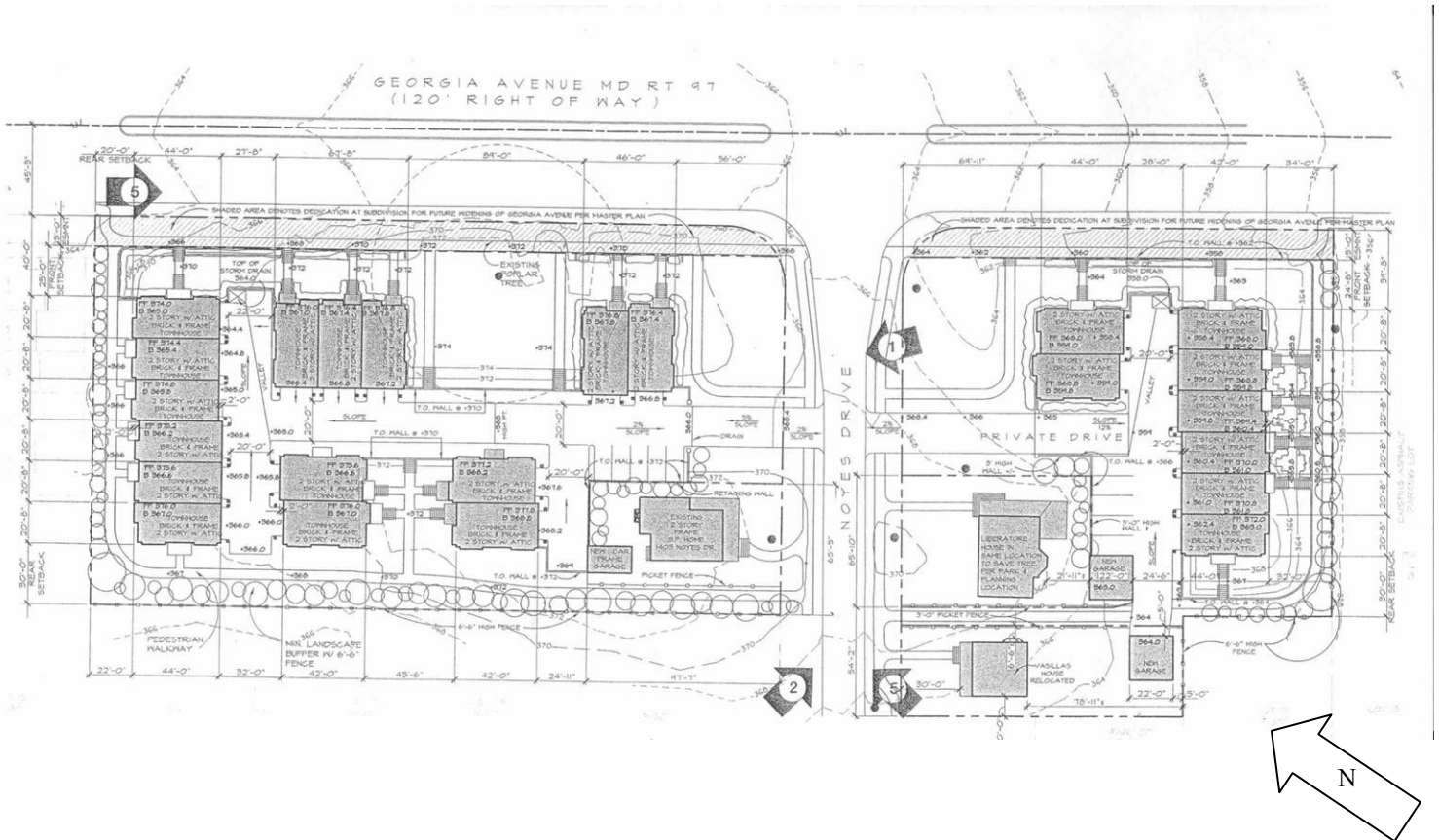
### **D. Proposed Development**

The Applicant proposes to construct twenty-three townhouse units and retain three (existing) single family detached units on the site, one of which (the southernmost house) will be moved from its present location on Georgia Avenue to a location on Noyes Drive.<sup>5</sup> An overview of the project can be seen in the illustrative diagram below, taken from the revised Schematic

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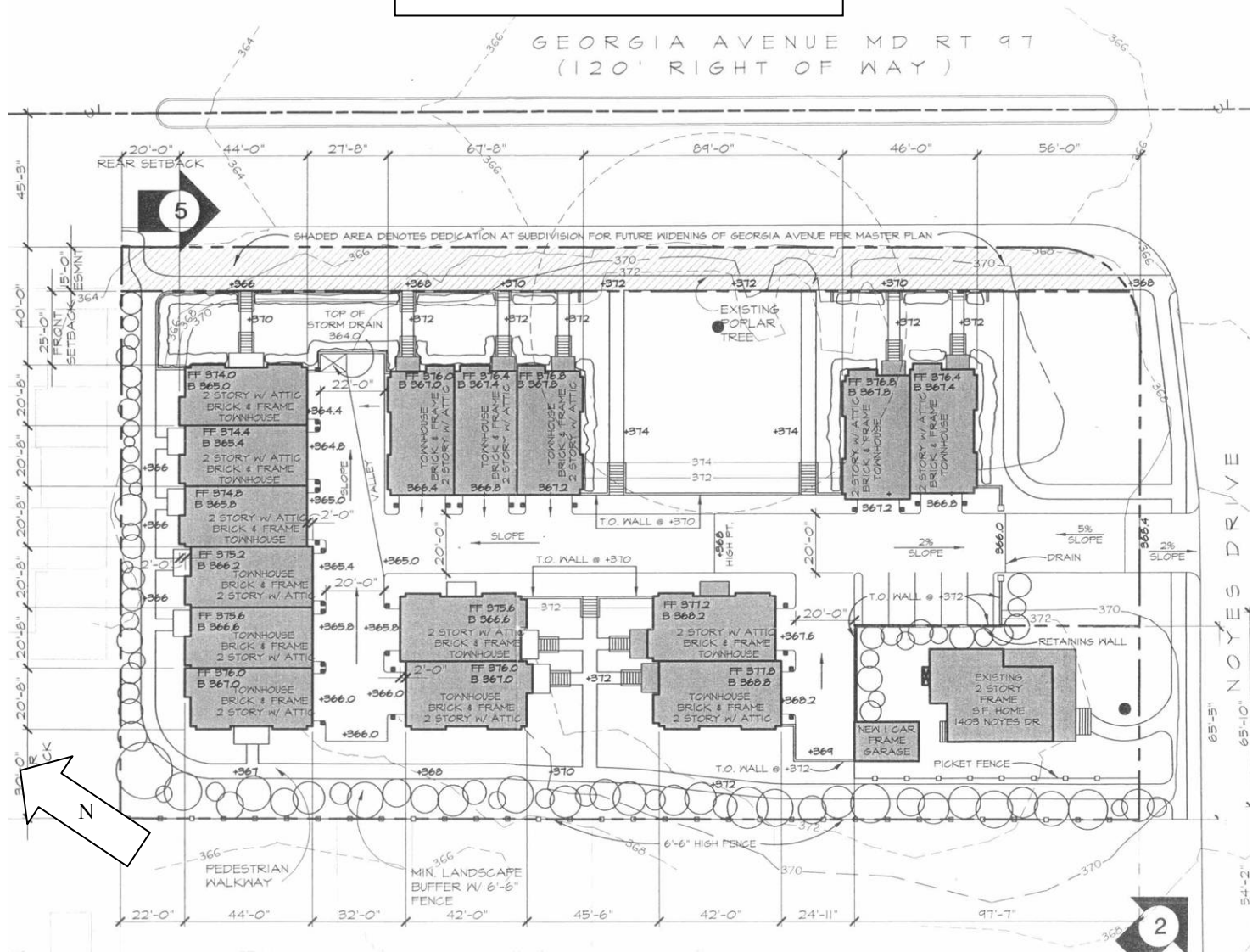
<sup>5</sup> The original plans called for 27 new townhomes and the retention of three houses, for a total of 30 dwelling units. After negotiations with the community and consultation with Technical Staff, Applicant reduced the number of proposed new townhomes to 23.

Development Plan (SDP)-Exhibit 62(d). The northern and southern sections are shown separately on the following pages to make the features more easily visible.



If the application is approved, development will occur along the west side of Georgia Avenue, on both the north and south sides of Noyes Drive. As described by Technical Staff, the section to the north of Noyes Drive is 1.5 acres in area and comprised of four lots identified above. Three homes currently exist in this section. The two bungalows that front on Georgia Avenue will be demolished. The other home, which fronts on Noyes Drive, will be retained. Fifteen townhomes will be constructed in this section.

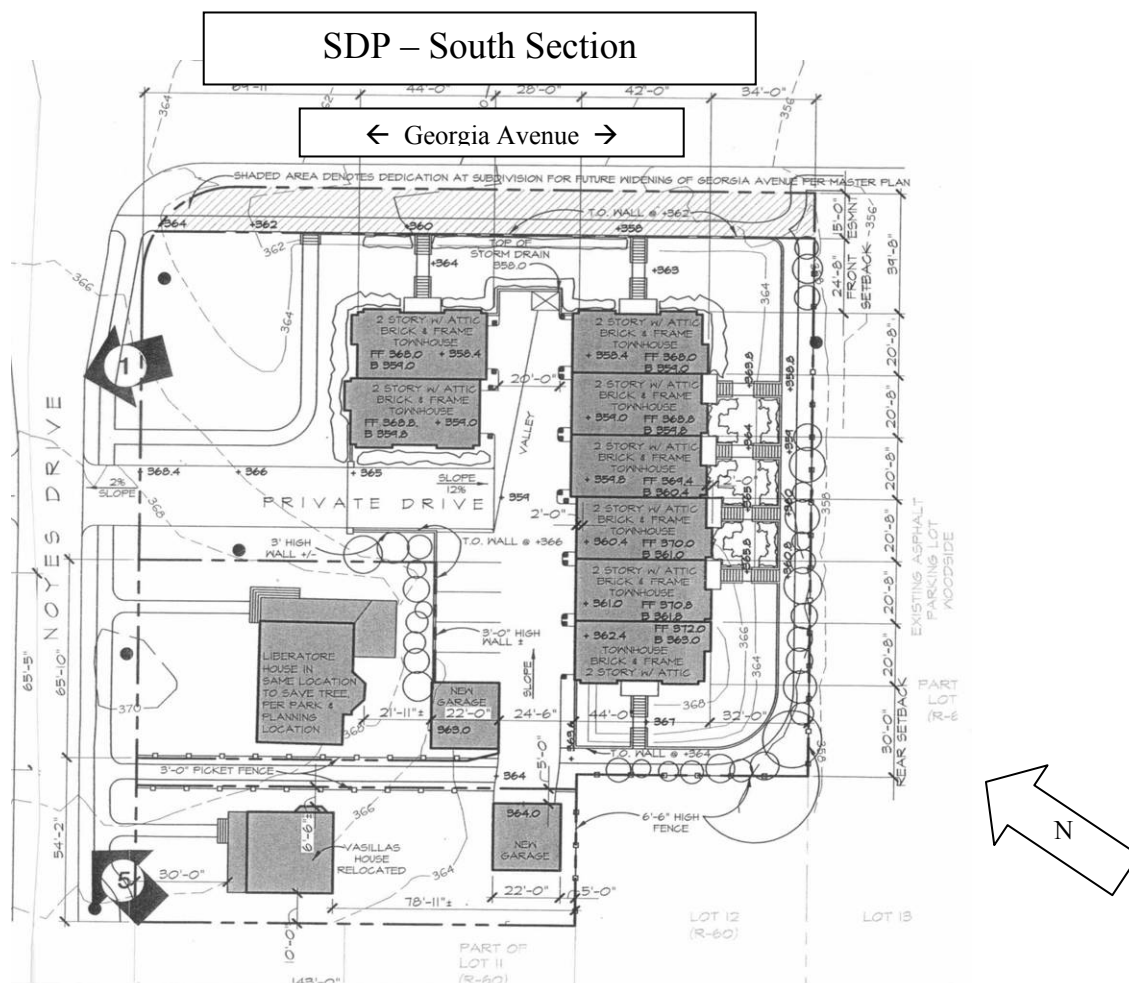
## SDP – North Section



As can be seen on the northern section of the SDP, the new units are arranged across this section in groups of six, three and two. According to Technical Staff, groups of two, or duplexes, are employed specifically to imitate the massing of single family dwellings. One stick of six townhomes faces existing townhomes at Ottawa Place, to the north. In accordance with the requirements of Zoning Code §59-C-1.722(b), the front building line in this stick is varied by 2 feet in the middle. One stick of three townhomes and one duplex front on Georgia Avenue. Two duplexes are oriented around a court on the west side of the section, north of the existing home that fronts on Noyes Drive. The units in this section meet the twenty-five foot street setback, ten-foot side yard setback and thirty-foot setback from one-family detached dwellings.

All units in the northern section will access Noyes Drive via an interior private drive, which extends approximately 250 feet north of Noyes Drive and forms a “T” serving all units internally. This design is intended to pull driveways and off street parking away from adjacent lots and coordinate access on a secondary street. All existing access points on Georgia Avenue will be removed, and all of the new town home units will have two-car garages. The existing house will have a new one-car, detached, frame garage. Five additional off-street parking spaces will be provided in this section for a total of thirty-six off-street parking spaces on this side of the development. A sidewalk is provided on street frontage, and a path is planned to connect the development and provide pedestrian access to the front doors of the interior units.

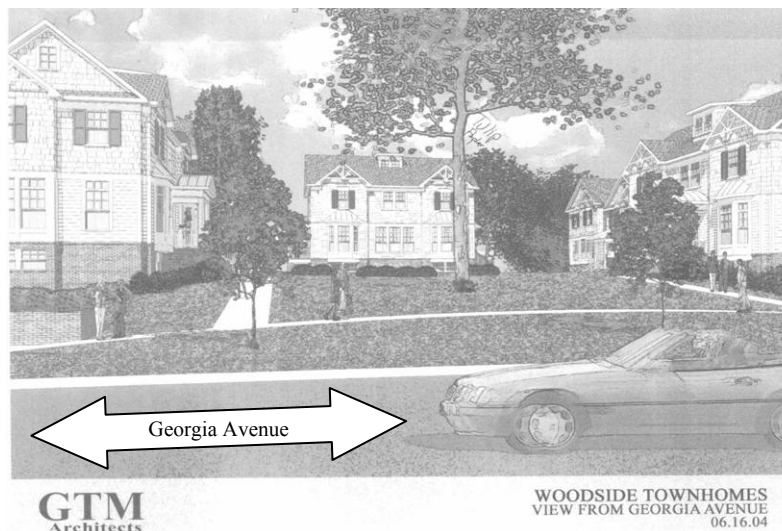
The section to the south of Noyes Drive is slightly larger than an acre in area and comprised of five lots, as previously identified. The southern section of the SDP is shown below.



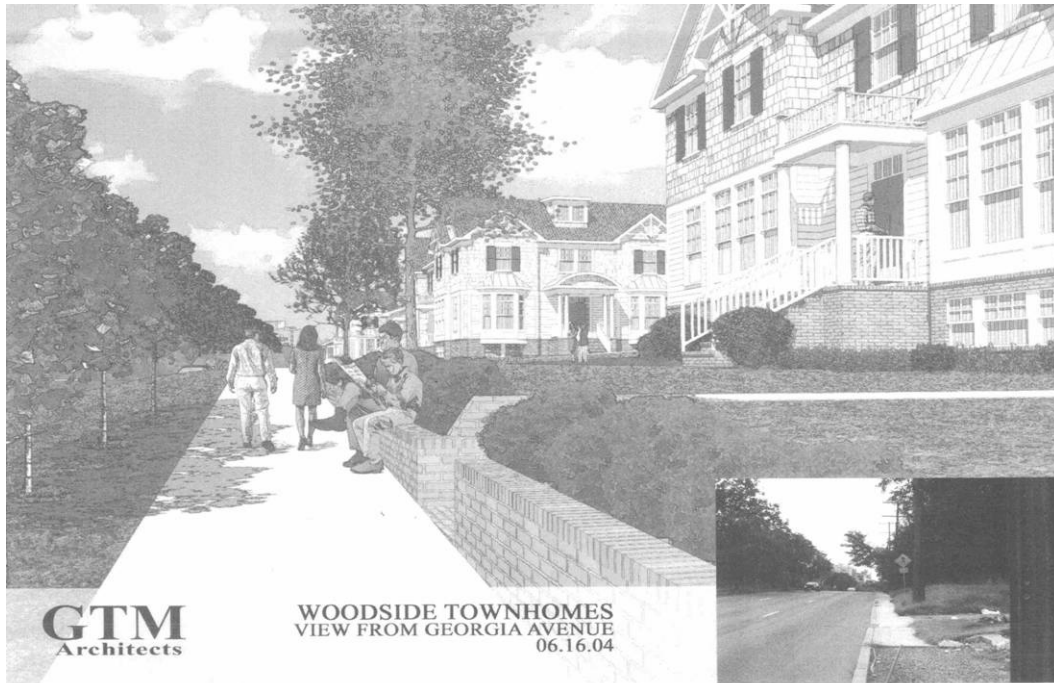
Two homes currently exist in this section. The one that fronts on Georgia Avenue will be relocated to Noyes Drive. The other home, which fronts on Noyes Drive, will be retained in its present location. Eight townhomes will be constructed in this section. Two of these units will be in a duplex, with one of the duplex units fronting on Georgia Avenue and the other on Noyes Drive. The other six units are combined into a stick facing the Woodside United Methodist Church to the south, although the unit at the eastern end of the stick fronts on Georgia Avenue and the unit at the other end of the stick fronts to the west. Setbacks and the two-foot front building line variation are met, as with the northern section.

All units in this section will access Noyes Drive via an interior private drive. The drive extends approximately 120 feet south from Noyes Drive into the section and forms a “T” serving all units internally, as with the northern section. Existing access points on Georgia Avenue will also be removed. The new town homes will also have two-car garages, and the existing units will have new two-car detached garages. Five additional off-street parking spaces will be provided in this section, for a total of twenty-five off-street parking spaces on the south side of the development.

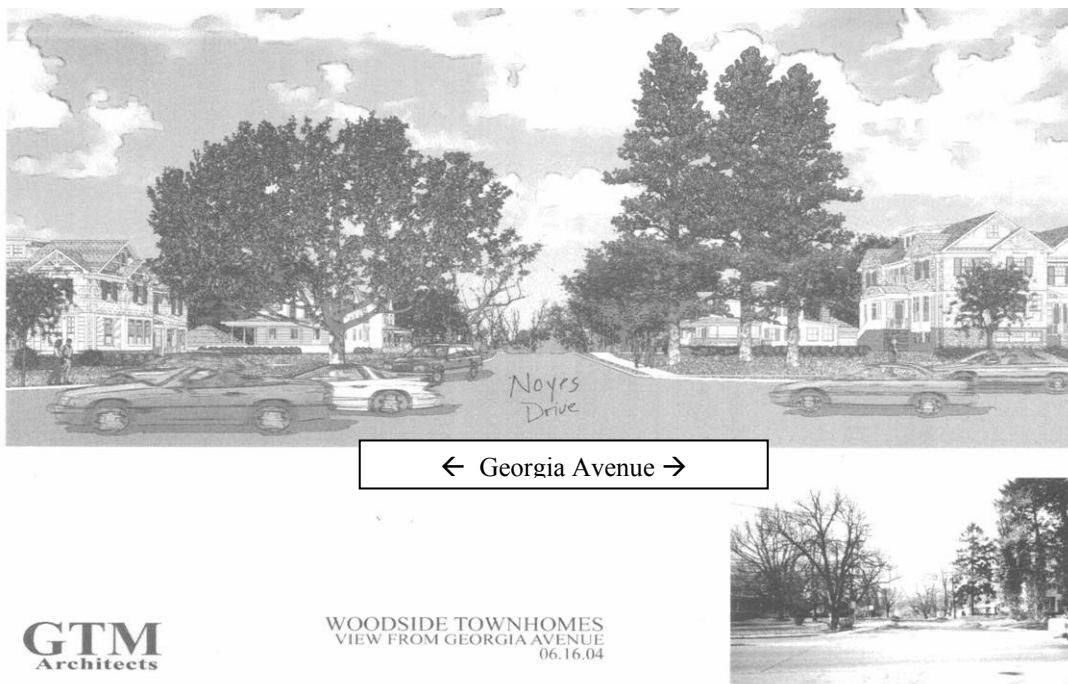
Applicant’s vision for the development is well illustrated in Exhibits 46, 47 and 48, artist’s conceptions of the proposed development, as viewed from three locations along Georgia Avenue. The view immediately below (Exhibit 46) portrays the development at the location of a 43 inch specimen Tulip Poplar, which was the subject of some debate, as explained on page 26 of this report.



The next view (Exhibit 47) is a “before and after” depiction of the proposed development looking south from the sidewalk along the west side of Georgia Avenue.



The final view (Exhibit 48) is also a “before and after” portrayal of the proposed development, but this one views the site looking west, directly at Noyes Drive from Georgia Avenue.





### E. Schematic Development Plan and Binding Elements

Pursuant to Code § 59-H-2.52, the Applicant in this case has chosen to follow the “optional method” of application. The optional method requires submission of a schematic development plan that specifies which elements of the plan are illustrative and which are binding, *i.e.*, elements to which the Applicant consents to be legally bound. Those elements designated by the Applicant as binding must be set forth in a Declaration of Covenants to be filed in the county land records if rezoning is approved. The Applicant has filed the required Declaration of Covenants in the administrative record of this case as Exhibit 70(a).

The legal effect of the covenants is to obligate any future owner of the property to comply with the binding elements specified on the SDP. Thus, the optional method allows an applicant to specify elements of its proposal that the community, reviewing agencies and the District Council can rely on as legally binding commitments. Illustrative elements of the SDP may be changed during site plan review, but the binding elements cannot be changed without a separate application to the District Council for a development plan amendment. The graphic portion of the SDP, which is illustrative, was reproduced on pages 11- 13 of this report. The SDP’s Binding Elements and General Notes from Exhibit 62(d) are shown below.

<b>BINDING ELEMENTS</b>	
PURSUANT TO SECTION 59-H-2.53 OF THE ZONING ORDINANCE	
1.	26 RESIDENTIAL DWELLING UNITS MAXIMUM: 23 TOWNHOUSES AND 3 SINGLE FAMILY HOMES
2.	MAXIMUM LOT COVERAGE OF 25% OF TRACT AREA (PRIOR TO DEDICATION)
3.	MINIMUM GREEN AREA OF 60% OF TRACT AREA (PRIOR TO DEDICATION)
4.	PRESERVATION OF EXISTING HOME @ 1403 NOYES DRIVE
5.	PRESERVATION OF EXISTING HOME @ 8918 GEORGIA AVENUE
6.	RELOCATION OF EXISTING HOUSE 8922 GEROGIA AVENUE TO NEWLY CREATED LOT ON NOYES DRIVE
7.	OWNER AND GUEST PARKING WILL BE PROVIDED ENTIRELY ON SITE, AND NOT ACCESSED FROM GEORGIA AVENUE

<b>GENERAL NOTES</b>
1. BOUNDARY AND TOPOGRAPHIC INFORMATION PROVIDED BY CAS ENGINEERING, MOUNT AIRY MD
2. THERE IS NO 100 YEAR FLOOD PLAIN ON THIS SITE.
3. THERE ARE NO NON-TIDAL WETLANDS ON THIS SITE.
4. PUBLIC WATER AND SEWER TO BE UTILIZED.
5. DRAINAGE BASIN: SLIGO CREEK WATERSHED
6. STORM WATER MANAGEMENT IS PROVIDED ON SITE.
7. BOUNDARIES COMPILED FROM PLATS.
8. DEVELOPED IN ONE PHASE.
9. PROJECT NOT DEPENDENT UPON ANY CAPITAL IMPROVEMENT PROGRAM.
10. AT THE TIME OF SITE PLAN, THE PROJECT WILL ADHERE TO THE BINDING ELEMENTS SET FORTH IN EXHIBIT NO. ____ IN THE RECORD OF ZONING CASE NO. G-817



The Applicant in the present case has proposed seven binding elements, which are shown above. These binding elements limit development to 23 townhouses and 3 single-family homes, a maximum of 25% building coverage, a minimum of 60% green space, the preservation of two homes, the relocation of a third home, and parking to be provided entirely on site, with no access from Georgia Avenue.

In addition to these binding elements, Applicant indicated its willingness to make additional binding commitments sought by the community and listed in Exhibit 38; however, the People's Counsel strongly objected to these additional promises being listed as "binding elements" in the SDP on grounds that, under the "Optional Method," such details should be left to Site Plan and Subdivision review. Tr. 69-75. The People's Counsel was especially adamant that item number 5 in Part A of Exhibit 38, a commitment "to preclude non-resident professional offices as special exception use," could not lawfully be included because it purported to restrict a right granted by statute to apply for a special exception. Tr. 175-178.

Following the hearing, Applicant submitted a revised list of commitments for site plan review (Part B of Exhibit 62(a)), leaving off the item regarding special exceptions for professional offices, which was so strongly objected to by the People's Counsel.<sup>6</sup> The remaining commitments are listed below. They are not binding elements of the SDP, but rather are promises by Applicant to include these items in its Site Plan when it is filed for review pursuant to Zoning Code §59-D-3.

**B. Required Site Plan Provisions to be Incorporated on Site Plan by the Applicant Pursuant to Division 59-D-3 of the Zoning Ordinance:**

1. Owner and guest parking will be provided entirely on site with no direct access from Georgia Avenue.<sup>7</sup>

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<sup>6</sup> Although the Hearing Examiner does not necessarily agree with the legal position taken by People's Counsel on this issue (Tr. 175-178), the question was mooted by Applicant's decision to withdraw the objected-to binding element.

<sup>7</sup> It may be noted that the first provision of this list is essentially the same as the 7<sup>th</sup> binding element on the SDP. If this duplication was an oversight by Applicant, it appears to be immaterial because the People's Counsel did not object to this item being included as a binding element on the SDP.

2. The existing tulip poplar tree on Georgia Avenue and the horse chestnut tree on the southwest corner of Georgia Avenue and Noyes Drive will be preserved through application of all commercially reasonable tree protection measures.
3. Subject to the Planning Board review at the time of site plan, the Applicant's site plan will reflect the following:
  - (a) on the portion of the property to the south side of Noyes Drive, in addition to the preserved and relocated homes, the project will have a row of 6 townhomes on the southern most portion of the property and a duplex on the east side adjacent to Georgia Avenue.
  - (b) on the portion of the property to the north side of Noyes Drive, in addition to the preserved existing home, the project will have a row of 6 townhomes on the northern most portion of the property, 2 duplexes on the west side of the property, and a triplex and a duplex on the east side of the property adjacent to Georgia Avenue.
4. The Applicant will provide landscape and screening improvements to provide an appropriate buffer between the project and the adjacent single family residential neighbors. The Applicant will coordinate with the adjacent neighbors and community before and during the site plan process to review the project and to collaborate regarding the planting and fence materials and similar screening treatments.
5. The Applicant will pursue with the Department of Public Works and Transportation ("DPWT") the installation of a public sidewalk on Noyes Drive from Georgia Avenue to 1<sup>st</sup> Avenue and further extending along 1<sup>st</sup> Avenue from Noyes Drive to Highland Drive. The Applicant will provide for the cost of the sidewalk and make all commercially reasonable efforts with DPWT to provide for the installation of such sidewalks to the extent possible given any right-of-way, street improvement and/or storm drainage issues.
6. The Applicant will further pursue with DPWT the feasibility of public funding for an expanded sidewalk network to include extension of sidewalk on Noyes Drive between 1<sup>st</sup> and 2<sup>nd</sup> Avenue.
7. The Applicant, with the support of the Woodside Civic Association, will pursue DPWT approval for a 4-way stop sign at Noyes and 1<sup>st</sup> Avenue.
8. Support request of Woodside Civic Association for DPWT approval of a speed hump mid-block on Noyes Drive between Georgia Avenue and 1<sup>st</sup> Avenue, and if approved, the Applicant will fund construction of speed hump if approved within the period extending until the end of construction for the proposed development.
9. Coordinate construction activity of the project to avoid conflicts with regular (Friday evening and Saturday morning) and holiday services of the confronting synagogue.

As noted by Technical Staff, these items represent concerns and requests of the Woodside Civic Association and other community participants, which will be addressed at Subdivision and

Site Plan review. There will also be an opportunity at that time to coordinate with DPWT on matters relating to sidewalks and improvements to Noyes Drive.

Finally, the SDP contained a recitation of the "Project Development Criteria," reproduced below, which compare Applicant's proposals with the statutory requirements for the RT-12.5 Zone.

# PROJECT DEVELOPMENT CRITERIA

**GTMI**  
ARCHITECTS

10413 ARMORY AVENUE,  
KENSINGTON, MD. 20895  
(301)942-9062  
(301)942-3929 FAX

## ZONING:

EXISTING

PROPOSED

R-60

RT-12.5

## GROSS TRACT AREA:

MINIMUM REQUIRED

PROPOSED

20,000 SQUARE FEET  
.46 ACRES

116,899 SQUARE FEET  
2.6836 ACRES

## DWELLING UNITS

ALLOWED / REQUIRED  
MAX. / MIN.

PROPOSED

12.5 PER ACRE  
OF USABLE AREA  
33 UNITS MAX.

23 TOWNHOMES &  
3 SINGLE FAMILY HOMES  
(2 EXISTING, 1 EXISTING  
RELOCATED)  
26 UNITS TOTAL

## COVERAGE BY BUILDING

ALLOWED / REQUIRED  
MAX. / MIN.

PROPOSED

55% MAX.  
(PRIOR TO DEDICATION)  
(40,915 SQUARE FEET)

TOTAL: 28,145 SQ. FT.  
24% COVERAGE

## GREEN SPACE

ALLOWED / REQUIRED  
MAX. / MIN.

PROPOSED

50% MIN.  
(PRIOR TO DEDICATION)  
(38,450 SQUARE FEET)

GREEN AREA: 7,051 SQ. FT.  
61% GREEN SPACE

## PARKING:

MINIMUM REQUIRED

PROPOSED

32 SPACES

61 SPACES

## BUILDING HEIGHT

ALLOWED / REQUIRED  
MAX. / MIN.

PROPOSED

35' MAX.

35'-0"

## BUILDING SETBACKS

REQUIRED

PROPOSED

FROM STREET:

25'

25'

## FROM ADJOINING LOTS:

SIDE:

10'

10'

REAR:

20'

20'

FROM DETACHED  
RESIDENTIAL UNIT:

30'

30'

(13th) Election District  
Montgomery County, Maryland

Schematic  
Development Plan

**WOODSIDE  
COURTS**

OF  
5  
22

**GTM ARCHITECTS**

10413 ARMORY AVENUE,  
KENSINGTON, MD. 20895  
(301)942-9062  
(301)942-3929 FAX

(13th) Election District  
Montgomery County, Maryland

Schematic  
Development Plan

**WOODSIDE  
COURTS**

## **F. Master Plan**

The subject property is located in the Woodside Neighborhood, within the North Silver Spring area of the *North and West Silver Spring Master Plan*, approved and adopted in August 2000 (the “Master Plan”). It is also within the recommended boundaries of the “potential” Woodside Historic District (Site 36/4) in the Locational Atlas & Index of Historic Sites in Montgomery County Maryland, but it has not yet been designated as an historic site. The Master Plan recommends “that the Woodside Historic District remain on the ‘Locational Atlas’ . . . for future consideration.” Page 27. The Historic Preservation aspects of this case are discussed in Part III. J., below.

The approved and adopted Master Plan reconfirms the existing zoning for North Silver Spring, except that it expressly recognizes “the possible redevelopment of townhouses along Georgia Avenue” and recommends that any rezoning to the Residential Townhouse (RT) Zone by local map amendment should use the optional method with a schematic development plan, as was done in this case. Master Plan, page 21.

Recognizing that townhouse development is permitted by the Zoning Ordinance, the Master Plan seeks to preserve the residential character of the area with specific guidelines (page 21):

- Limit the development of townhomes to the blocks along Georgia Avenue and do not encroach on interior blocks.
- Buildings should front on Georgia Avenue, where possible, in order to maintain an attractive residential appearance and enhance the urban boulevard character.
- Along Georgia Avenue, ends of a townhouse row should be designed to appear as fronts, rather than blank facades on Georgia Avenue.
- A minimum front yard setback of 25 feet should be provided on Georgia Avenue.
- Vehicular access points should be minimized along Georgia Avenue to reduce pedestrian/auto conflicts.
- Attractive landscaped open spaces and streetscaping should be provided, including a sidewalk separated from the curb with a tree panel.
- Parking and/or garage access should be oriented to the rear of the buildings and sufficiently screened from adjoining properties.

As stated in the Technical Staff report, “[t]he current schematic development plan is consistent with all of these Master Plan objectives.” Applicant’s land planning expert, Dave Ager, concurs. Tr. 217.

### **G. Development Standards for the Zone**

As shown in the table below, excerpted from the Staff Report with slight modification, the proposed development would be consistent with the applicable development standards for the R-T 12.5 Zone.

The intent and purpose of the RT-Zone is set forth in Zoning Code §59-C.1.721, which specifies that one purpose of the RT-zone is “to provide suitable sites for townhouses . . . [i]n sections of the County that are designated or appropriate for residential development at densities allowed in the R-T Zones.” The applicable Master Plan identifies sites along Georgia Avenue as potential locations for RT zoning, and thus the purpose clause is met by this application.

Although the stated intent of the R-T Zone is “to provide the maximum amount of freedom possible in the design of townhouses and their grouping,” the Zone nevertheless has special row design requirements for townhomes. Zoning Code §59-C-1.722. The maximum number of units in a group is eight, and three continuous, attached townhouses is the maximum number permitted with the same front building line. Variations in the building line must be at least 2 feet.

Applicant’s proposal meets these requirements. It is comprised of a mixture of groups of two, three and six units. The groups of six are only located adjacent to other existing townhomes or institutions, and they have the required two-foot variation in their front building lines. The proposed density for the submitted development is approximately 9.7 dwelling units per acre, though a density of 12.5 dwelling units per acre is permitted in the Zone.

The following chart shows the development standards and the proposals for the rezoning application:

***Development Standards for R-T 12.5 Zone*****Code §§ 59-C-1.731 - 1.735**

<b>Development Standards for RT-12.5 Zone</b>		
<b>Standard</b>	<b>Permitted/Required</b>	<b>Proposed</b>
Minimum tract area	20,000 sq. ft. (0.46 ac.)	116,899 sq.ft. (2.68 ac.)
Maximum density	12.5 units/ acre (33 max)	9.7 units/ acre (26 total)
Building setback requirements		
- Public street	25 feet	25 feet
- From adjoining lots	10 feet	10 feet
- Rear	20 feet	20 feet
- From adjacent single family detached	30 feet	30 feet
Maximum Building Height	35 feet	35 feet
Minimum Green Area	50 percent	61 percent
Maximum Building Coverage	35 %	24%
Minimum Parking	2 spaces/ unit (52)	61

As is evident, development parameters for the subject proposal are consistent with the R-T 12.5 Zone.

**H. Public Facilities**

Under the County’s Adequate Public Facilities Ordinance (“APFO,” Code §50-35(k)), the Planning Board has the responsibility, when it reviews a preliminary plan of subdivision, to assess whether the following public facilities will be adequate to support a proposed development: transportation, schools, water and sewage facilities, and police, fire and health services. The Planning Board’s application of the APFO is limited by parameters that the County Council sets each year in the Annual Growth Policy (“AGP”) and biennially in the two-year AGP Policy Element. While the ultimate test under the APFO is carried out at subdivision review, evidence concerning adequacy of public facilities is relevant to the District Council’s determination in a rezoning case as to whether the reclassification would serve the public interest.

## 1. Transportation

Under the 2003-05 AGP Policy Element, as of July 1, 2004 subdivision applications are subject to Local Area Transportation Review (“LATR”) requirements. LATR generally involves a traffic study intended to evaluate whether a proposed development would result in unacceptable congestion during the peak hour of the morning and evening peak periods. As of July 1, 2004, however, an LATR traffic study is not required unless a proposed development would generate 30 or more peak-hour automobile trips.

In the present case, Transportation Planning Staff estimated that the proposed development would generate 11 trips during the weekday morning peak hour and 20 trips during the weekday evening peak hour, well below the 30-trip threshold that triggers LATR Review.<sup>8</sup> Based on this review, Transportation Planning Staff concluded “that the trip generations are low and [that] impact on intersections in the vicinity of the site will be minimal.” They also noted that the site will gain two access points from Noyes Drive, and determined that their location at the mid-point of the site’s frontage along Noyes Drive would maximize the safety of the vehicular and pedestrian movements. Transportation Planning Staff also concluded that there will be adequate sidewalks along Georgia Avenue, Noyes Drive, and First Avenue.<sup>9</sup>

Applicant’s traffic engineering expert, Craig Hedberg, testified that using the LATR guidelines,<sup>10</sup> he projected that the new development would produce a net increase in peak hour trips of 9 in the morning and 17 in the evening. Tr. 182-183. When Mr. Hedberg added in the

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<sup>8</sup> These figures were apparently based on Applicant’s original plan for 30 dwelling units, not the current plan for 26 dwelling units, because Applicant’s traffic engineering expert, Craig Hedberg, testified that he arrived at the same figures based on the original proposal. Tr. 181. He also testified to a revised estimate based on the reduced number of townhouses planned, and that revised estimate is discussed in the text above.

<sup>9</sup> Transportation Planning Staff also concluded that Applicant had satisfied the Policy Area Transportation Review (PATR), but since that review was eliminated by the Council in the FY 2003-05 Policy Element of the new AGP, effective July 1, 2004, the PATR will not be considered in this report. It is sufficient to say that the LATR standards have been satisfied, and that fact was not disputed in this case.

<sup>10</sup> The Hearing Examiner takes official notice of the Local Area Transportation Review (LATR) Guidelines issued by the Planning Board on July 1, 2004.

trips which were already being generated by the three homes that will be retained, and took no deduction for the 2 homes that were to be demolished, the total peak hour trips generated would be 14 in the morning and 22 in the evening. Accordingly, no transportation study would be required to satisfy LATR. Tr. 206-207. These findings are reported in Exhibit 54. Mr. Hedberg also opined that the Applicant's proposals were consistent with the Master Plan and would improve vehicular and pedestrian safety. Tr. 190-191.

At the request of the Woodside Civic Association, Mr. Hedberg gathered additional data on traffic and pedestrian flow around Georgia Avenue and Noyes Drive. Tr. 183-189. Mr. Hedberg testified that, based on admittedly incomplete data, it did not appear that there was sufficient vehicular or pedestrian traffic to warrant installation of a traffic signal. His analysis is summarized in Exhibit 55.

## 2. Utilities

Technical Staff stated in its report that water and sewer lines abut the subject property, and there will be negligible impact from the requested rezoning. The Water and Sewer Service categories are W-1 and S-1, respectively, and local service is deemed adequate. See Staff Report at 5. The Applicant's written engineering report (Exhibit 10) states that electric, telephone, gas and cable television are all available adjacent to the property.

## 3. Schools

The effect of this development upon area schools was evaluated by Joseph J. Lavorgna, the Director of Planning and Capital Programming for the Montgomery County Public Schools, in a letter to Technical Staff dated January 6, 2004 (Exhibit 63). Based upon average yield factors for comparable housing units, the impact of this project was estimated by Mr. Lavorgna to be approximately 8 elementary, 4 middle, and 5 high school students. The subject property is located within the Woodlin Elementary and Sligo Middle School service areas. According to Mr.



Lavorgna's letter, both Woodlin Elementary School and Sligo Middle are projected to be operating within capacity for the six year forecast period.

At the high school level, the property is "within the base area for Albert Einstein High School, and part of the Downcounty High Schools Consortium area." Albert Einstein High School is operating over capacity, and "is projected to exceed capacity for the six year forecast period." Mr. Lavorgna notes that "[c]hoice patterns within the Downcounty High Schools Consortium may affect enrollment trends at Albert Einstein High School in the future."

Nevertheless, Mr. Lavorgna concludes by stating that the "current Annual Growth Policy (AGP) schools test finds capacity adequate in the Albert Einstein cluster." Both Technical Staff and Mr. Lavorgna note that capacity will be adequate, as well, under the new AGP schools test effective July 1, 2004, assuming the requested fiscal year 2005-2010 Capital Improvements Program is fully funded.

## **I. Environment**

Applicant's Planning, Land Use and Civil Engineering Report (Exhibit 10) asserts that "there are no forest stands on site, only a 0.35 acre woodlot of very poor quality trees dominated by non-native and/or invasive plant species and few native and healthy hardwood species." The report also notes that "there are healthy and structurally sound mature specimen trees on the Property, which the Applicant intends to retain and integrate into the site design. There are no significant rock outcroppings on the Property, and there were no rare, threatened or endangered species observed on the Property."

M-NCPPC's Environmental Planning Staff reviewed the proposed project and recommended approval, with comments to be addressed in subsequent Staff reviews. They noted that the site, which is located in the Lower Sligo Creek subwatershed, is not within a Special Protection Area nor

the Patuxant River Primary Management Area. Environmental Staff also found that there are no steep slopes, wetlands, streams, floodplains or associated buffers impacting on the site.

Staff noted that a Natural Resource Inventory/Forest Stand Delineation (NRI/FSD) has been submitted and approved. They also found that that Preliminary Forest Conservation Plan submitted by Applicant “conceptually meets the requirements of the Forest Conservation Law.” They conclude by noting that the plan will be refined and approved during further review processes.

In the view of the Environmental Staff, “the most pressing environmental concern on this application is tree save.” There are eight specimen trees on site and approximately thirteen significant trees. Three of the eight specimen trees are in very good condition, and the Environmental Staff wanted them preserved. One of those trees, number 44, a 43” Tulip Poplar, became surprisingly controversial in this case. The Applicant is perfectly willing to save it, and the tree is prominently identified on the SDP as “Existing Poplar Tree” located along Georgia Avenue in the northern section of the property.

The People’s Counsel, however, felt that preservation of this tree made it much more difficult to end up with the best possible development. In fact, he felt strongly enough to characterize his final position on this project as “neither in support of or in opposition to” the application. Tr. 275-279. Nevertheless, Technical Staff determined that preservation of the tree was a required aspect of the SDP, and it remains in the proposal. Applicant’s forest conservation expert, Dusty Rood, testified, in substance, that there was no practical alternative to saving the Tulip Poplar, given the stringent tree-save requirements of the recently amended conservation law. Tr. 125-136. The Hearing Examiner finds that Applicant has designed very well around the tree, and certainly does not see the preservation of this tree as a basis for considering denial of this application.

## **J. Historic Preservation**

As noted above, the subject site is within the recommended boundaries of the “potential” Woodside Historic District (Site 36/4) in the Locational Atlas & Index of Historic Sites, but it has not yet been designated as an historic site. At the suggestion of Technical Staff, Applicant’s proposal was submitted to the Historic Preservation Commission (HPC) for a “preliminary consultation” on April 14, 2004.

The HPC “generally approved of the architectural design of the new townhouses,” as stated in the May 19, 2004 report by the Staff of the HPC (Exhibit 45). According to the HPC Staff report, “[t]he majority of Commissioners felt that they could support demolition of the two bungalows (9008 Georgia Avenue and 9012 Georgia Avenue) and the relocation of one turn-of-the-century house (8918 Georgia Avenue).”

The language in the HPC Staff report is instructive:

In the revised design, the applicants have addressed many of the HPC’s comments. They have reconfigured the project so that there is a significant amount of open space at the intersection of Noyes and Georgia. This does allow for a wide viewshed toward the three historic houses and does allow for preservation of a number of trees. They have been able to accomplish that goal while still preserving open space around the existing Poplar tree that environmental planning wants them to retain. This has meant a decrease of two townhouse units on the north side of the project.

They have also be able to retain building frontages along Georgia that approximate the pattern of single-family home building widths — that is, there are no long strings of townhouses facing Georgia Avenue. The longest grouping is three town houses. Staff feels that this in an important and positive aspect of this project.

The building heights for the new townhouses have not changed. However, since the new structures are pulled farther away from the old houses, staff is less concerned about the impact of the higher townhouses.

Based on the fact that Applicant had integrated the guidance of the HPC into its revised design, the HPC Staff recommended that the Applicant “move forward to file a Historic Area Work Permit application for this project.” According to M-NCPPC Technical Staff, after zoning,

subdivision and site plan are completed, the Applicant must return to the HPC for alteration or demolition requests for each of the existing homes, prior to building permit approval.

### **K. Community Concerns**

Community involvement in this case ranges from strong support (Alvarez testimony on behalf of himself, 12 other nearby residents and the Woodside Town Community Association – Exhibit 52) to complete opposition (Nichols letter – Exhibit 34, Dickhaut letter attached to Technical Staff report and Brookhart testimony). The Woodside Civic Association (WCA) is somewhere in the middle, with what the Hearing Examiner would characterize as “qualified opposition,” although Technical Staff called WCA’s position “conditional support.”

#### 1. Woodside Civic Association and Those in Opposition:

The WCA approved a resolution, dated June 9, 2004, that expresses its position on the application, and its President, Susan Stamm, also testified. The current schematic development plan does not reflect all of the conditions desired by the WCA because the Applicant has not agreed to all the requests. Consequently, WCA agrees with some aspects of the plan, disagrees with others and has made requests for binding elements to address improvements on and off site. The resolution of the WCA, a copy of which is attached to the Technical Staff report, represents a reflection of all the community concerns. It is therefore summarized (in italics) below, followed by the Hearing Examiner’s commentary on each point.

*WCA supports the retention of the three single family homes as specified in the SDP, but its support for the overall project “is conditioned on the following binding elements:”*

*1. Reduce unit count to 21 townhouses in order to reduce the massing of the proposed six-unit groupings at the northern and southern perimeters.*

Technical Staff found that the six unit groups and the locations selected for them were acceptable, considering adjacent uses (*i.e.*, townhouses to the north and a church parking lot to the south). The Hearing Examiner agrees. As situated, these groupings are compatible with the community. It should be remembered that Applicant has already reduced the number of townhouses in this project from 27 to 23 in response to community and governmental concerns, and the Planning Board will have a further opportunity to look at this question during site plan review.

*2. Construct on-site and off-site sidewalk improvements and tree replacement. Should adjacent property owners oppose these improvements, WCA requests that an, equivalent dollar amount be invested to improve the park at the corner of Georgia Avenue and Spring Street.*

Applicant has addressed these concerns in its commitments for Site Plan contained in Exhibit 62(a).

*3. Replat the lots occupied by three single-family houses to R-60 standards.*

As explained by Applicant's counsel to Ms. Stamm's apparent satisfaction at the hearing, the houses in question must remain part of the RT-12.5 rezoning in order for the binding commitments to retain them to be effective, but Applicant would still comply with the R-60 standards for these houses. Tr. 262-264

*4. Protect the existing specimen Tulip Poplar. Finalize a landscaping plan including areas for informal gathering and play for residents.*

Applicant has committed to saving this tree in commitment B.2 for Site Plan contained in Exhibit 62(a). Commitment B.4 addresses landscaping and buffering, but does not specifically address the open space elements. Those issues will, however, be the subject of Site Plan review.

*5. Reduce the elevation of homes near existing houses on First Avenue and Noyes Drive as much as possible so that new homes do not tower over existing residences.*

The SDP shows that all of the townhouses are planned as two-story brick and frame, with attics, so none of these structures will “tower over” nearby two-story residences. Applicant has also taken some steps to reduce the elevations of the proposed townhouses. Tr. 50 and 154. Moreover, the size and scale of buildings as one gets closer to Noyes Drive have been scaled down to replicate the scale massing of a single family home, and the three single family homes along Noyes Drive are used as a single family detached buffer to the existing neighbors. Tr. 219-220.

*6. Develop a storm-water management plan that prevents runoff from impacting adjacent existing homes that are downhill from the project area*

This concern was highlighted at the hearing through the testimony of community resident, Cheryl Gannon. Ms. Gannon testified to the disturbing history of stormwater flooding in her area, and opposed processing of the subject application until appropriate measures are devised to deal with the problem. Tr. 112-117.

According to Technical Staff, stormwater management will be provided according to County standards. At the hearing, Applicant’s expert in civil engineering, Curt Schreffler, testified that although there is an existing storm drain system, his firm would design storm water management, quality and quantity control systems, using various methods that are accepted by the State and County, including underground storage for quantity control and filtration systems for quality control. Discharge from these systems will be directed into the storm drain in Georgia Avenue and not towards neighboring properties to the west. Applicant would also push the natural divide on the property further west, so that more water would drain eastward, directly towards Georgia Avenue, rather than the neighborhood. In Mr. Schreffler’s expert opinion, there will be less storm drainage to the west following construction of this project than there is at present. Tr. 97-106.

Although Ms. Gannon's testimony is troubling, this issue must be dealt with at site plan and subdivision, not at the this stage of the proceeding, as long as there is evidence that Applicant will address the situation. The undisputed expert evidence demonstrates Applicant's intention to devise a storm water management plan that will ameliorate, not exacerbate, the problem.

*7. Secure approval to construct a four way stop at the Noyes and First Avenue intersection and a speed hump, mid block on Noyes Drive between Georgia and First Avenues.*

Technical Staff reports that DPWT was notified of these requests at the Development Review Committee, and the requests will be carried forward in subsequent development approvals for this site. The Applicant has agreed to pursue these items in commitments B.7 and B.8 in Exhibit 62(a), and to fund construction of the speed hump if approval occurs while its project is still being built.

*8. Prohibit non-resident professional office special exceptions in the development.*

Applicant was willing to include this prohibition in its binding elements and so indicated in its Exhibit 38. Based on the strenuous objection of the People's Counsel (Tr. 175-178), Applicant removed this item from the list of binding elements submitted in Exhibits 62(a) and (d). See discussion on page 17 of this report. Nevertheless, it is less than clear that a petitioner for such a special exception could lawfully obtain one. The language in the Zoning Code §59-C-1.71(d) appears to limit the professional offices available by special exception to medical practitioners. Moreover, as pointed out by Technical Staff, the Master Plan attempts to designate where such special exceptions would

be appropriate, and the subject site is not expressly designated as appropriate.<sup>11</sup> Thus, even without a binding element prohibiting such special exceptions, it is unlikely that one could be successfully obtained at the subject site.

*9. WCA should have input into development of the Homeowner Association covenants, bylaws and restrictions, with the end goal of integrating the new development into the Woodside neighborhood.*

Technical Staff indicates that the developer shares this objective. According to Technical Staff, draft covenants have been submitted and would be finalized at site plan review, where WCA would have an opportunity to comment.

Other opposition to the proposed development was represented in the testimony of Cynthia Greer and Sarah Brookhart.<sup>12</sup>

Cynthia Greer testified that she has lived in the neighborhood at 8807 Second Avenue for over 10 years and is very concerned about the traffic that may be generated by the project. Tr. 238-248. In Ms. Greer's opinion, Noyes Drive is "particularly ill-suited for increase[d] traffic." Given the impact of the development of downtown Silver Spring, Ms. Greer "would like the County to really look at limiting entry into the neighborhood via Noyes [Drive]." Tr. 242.

Ms. Greer further testified that there was a 40% increase in traffic along Second Avenue from 2000 to 2003. On cross-examination, she admitted that the proposal for a four way stop at Noyes and First Avenue would be a good idea, and Applicant's counsel indicated his willingness to work with the community on traffic calming devices.

Sarah Brookhart testified that she lives at 8825 First Avenue in Silver Spring, and that she

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<sup>11</sup> The southern portion of the property is specifically shown on Map 18, page 45 of the Master Plan, as unsuitable, while the northern portion of the property contains no specific designation, leaving the impression that the generally negative text language on page 43 would apply.

<sup>12</sup> The transcript incorrectly identifies Mrs. Brookhart as "Sarah Burkehart."



and her family are adjacent property owners to this project. Mrs. Brookhart, speaking on behalf of herself, her husband and other nearby owners, referenced statements she and her husband had submitted to Park and Planning expressing concerns and recommendations about the rezoning because “we felt that the proposal was not compatible with the community and we believe there's a direct negative impact on our ability to use and enjoy our property.” Tr. 230-236.

Her concerns included increased storm water runoff, noise and light pollution, loss of view, traffic, pedestrian safety, parking, zoning on the single family lots, the historic house that's going to be moved, survival of the trees, inclusion of the single family lots in the rezoning and the diminishing the green space. In addition to these concerns, her submissions to the Planning Board (attached to Exhibit 37(b)) also raised issues regarding the design and layout of the townhouses, the extent and location of the project, the rezoning precedent that might be set, “aesthetic harm,” increased density and loss of historical resources.

Mrs. Brookhart urged that the townhome community known as Woodside Way, not the older Ottawa Place project, be used as a good example of a recent project which included an ample green-space buffer as a result of community input. Her Planning Board submissions also contained the following recommendations: Limit the number of units to 14; reduce the scale of the units; retain the R-60 zoning for the single family homes; require storm water management, landscaping and other mitigation plans; create a barrier to cut-through traffic on Noyes Drive; and establish a moratorium on rezoning for townhouses on Georgia Avenue.

Some of these points have not been mentioned elsewhere in this report and therefore are addressed briefly here. Questions relating to storm water runoff, traffic, parking and pedestrian safety have been discussed above. Questions relating to the best design, layout and location of all structures to improve the aesthetics and to reduce noise and light pollution will be dealt with at site plan review, pursuant to Zoning Code §59-D-3. Inclusion of the three detached houses in this

development as part of the rezoning request enables them to be protected by binding elements and recorded covenants. Moreover, Zoning Code §59-C-1.71(a) requires that any “one-family detached” dwelling unit in an R-T Zone be subject to the requirements of the R-60 Zone. Thus, including them within the rezoning will not change the standards under which they are maintained.

The historical concerns raised by Mrs. Brookhart and others are best handled by the Historic Preservation Commission, the agency charged with that responsibility, and the Hearing Examiner has relied on the HPC staff memorandum cited in Part III. J., above. As to green space, Zoning Code §59-C-1.734<sup>13</sup> requires 50% for this R-T 12.5 Zone; the Applicant has committed to providing 60% green space in a binding element. In another binding element, the Applicant has promised not to exceed 25% building coverage of the tract, even though the same statutory section permits a building coverage of up to 35%. The Applicant has also committed, in Exhibit 62(a), ¶ B.4, to landscaping and other mitigation plans at Site Plan review. Regarding Mrs. Brookhart’s request for a barrier to “cut-through traffic on Noyes Drive,” the question of whether it is advisable to create such a barrier is a matter for subdivision, not rezoning..

The suggestion of a moratorium on rezoning for townhouses on Georgia Avenue is a policy issue that cannot be addressed in the context of a rezoning application. Moreover, the Hearing Examiner’s role is to review the record and write a report evaluating whether the proposed development meets the statutory standards for the zone, is compatible with surrounding area and is in the public interest, when considered in conjunction with the applicable master plan, the recommendations of the Planning Board and its Technical Staff and the effect on public facilities. If a proposed development meets these standards, the Hearing Examiner has no authority to tell a developer to reduce the number of dwelling units from 26 to 14 or to reduce the scale of the units. The expert testimony in this case, as well as the expert opinions of the Technical Staff and the

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<sup>13</sup> The Zoning Code erroneously refers to this section as “59-C-1.34,” but it is clear from the numbers before and after that it should read “59-C-1.734.”

Planning Board, support a finding that the proposed development does, in fact, meet the applicable standards. The involvement of members of the community has already had an impact on the number of proposed dwelling units, the configuration of the development and the commitments of the Applicant; however, many of the legitimate concerns they continue to raise are best addressed at site plan and subdivision review.

## 2. Woodside Synagogue Ahavas Torah:

Woodside Synagogue Ahavas Torah (WSAT) expressed two concerns in a February 19, 2003 letter to the Planning Board, a copy of which is attached to the Technical Staff report – the danger increased traffic poses to its congregants who walk to services and the potential that construction will obstruct pedestrian walkways and may disturb religious services. Therefore WSAT would like a traffic light to be installed at the corner of Georgia and Noyes, and extension of sidewalks “fully down Noyes Drive and First Avenue.” In addition, WSAT requests binding elements that will insure congregants a safe pathway to the synagogue and will prohibit external construction work during religious services.

Technical Staff indicates that it has and will continue to convey to the State Highway Administration concerns about pedestrian safety at the intersection of Noyes Drive and Georgia Avenue. Applicant committed to pursuing, with DPWT, installation of a sidewalk on Noyes Drive, from Georgia to First Avenue (Exhibit 62(a), ¶ B.5.), and also promised to coordinate construction to avoid conflicts with religious services (Exhibit 62(a) ¶ B.9.).

## 3. Ray Alvarez and Other Supporters:

Community support for the project was led by adjacent homeowner, Ray Alvarez. He submitted to the Planning Board a document entitled “Comments of Woodside Community Adjacent Owners in Support of Woodside Courts Project of Noyes Lane LLC,” a copy of which is

attached to the Technical Staff report. As Mr. Alvarez signifies with single asterisks in the signature list attached to his written testimony before the Hearing Examiner (Exhibit 52), only two of the homes listed are actually adjacent, his own at 8909 1<sup>st</sup> Avenue and the one next door at 8911 1<sup>st</sup> Avenue.<sup>14</sup> Nevertheless, the others are nearby and his testimony was adopted by the Woodside Town Community Association, which represents 24 townhomes immediately to the north of the proposed development (*i.e.*, the Ottawa Place Townhomes). Tr. 139-141.

In Mr. Alvarez's opinion, "the current plan not only addresses our concerns as adjacent property owners, but brings significant benefits to the Woodside community at large . . . . It also complies with the requirements of the various government entities including the County Commission which seek to protect public interest. In short, we believe the current proposal is an excellent compromise." Tr. 142.

Mr. Alvarez testified that benefits of the plan include preservation and renovation of three historic homes, limited height of the proposed development, consultation with the community as to landscaping, fencing and screening materials, a lower density than originally planned, maximum lot coverage of 25 percent of the tract and minimum green area of 60 percent, reduction of the largest unit directly facing adjacent single family owners to a duplex, parking entirely on site, and commercially reasonable efforts by the applicant to install public sidewalk on Noyes Drive to First Avenue and extending on First Avenue to Highland Drive. Tr. 142

According to Mr. Alvarez, the project "will also bring welcome relief from blight to the neighborhood." Tr. 143. Mr. Alvarez feels that the highest and best use of these Georgia Avenue properties is not single family residential "since no one is purchasing the properties for that purpose." In Mr. Alvarez's words, "the prudent and reasonable solutions of the master plan must be able to be invoked to protect the neighborhood and adjacent owners from harm." Tr. 144

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<sup>14</sup> The original members of his group were all adjacent owners and that is how the name of the group originated.

In his opinion, the opposition amounts to “a collateral attack on the Montgomery County Master Plan,” which should not be allowed.

Mr. Alvarez testified that “the project taken as a whole will be an asset to Woodside, [will] result . . . in the renovation and preservation of historically significant Woodside properties and provide tangible benefits to the community, including those related to safety and well being of all Woodside residents.” He completed his direct testimony by urging the Council to favorably consider the Applicant's rezoning application for the project. Tr. 146.

On cross-examination, Mr. Alvarez testified that he had heard that Applicant might have an option to purchase Mr. Liberatore’s property for 1.3 million dollars, but he had “no idea whether that is accurate or not.” Tr. 152. Upon learning that the actual price was \$1.1 million, Ms. Brookhart wrote to the Hearing Examiner (Exhibit 65) asking that the record be reopened and further testimony obtained. The Hearing Examiner did reopen the record (Exhibit 66) to allow all parties the opportunity to respond to Ms. Brookhart’s letter, but there appears to be no reason to obtain further testimony. Mr. Alvarez indicated in his testimony that he was unsure of the number, and the Hearing Examiner finds that the price for Mr. Liberator’s property, whether it is \$1.1 million or \$1.3 million, is totally irrelevant to these proceedings. Moreover, Mr. Alvarez was forthright in disclosing in Exhibit 52 that the Liberatores, who were signatories to Mr. Alvarez’s written testimony, had a pecuniary interest in the project.

Mr. Alvarez also made clear that neither he nor anyone else he knew of, other than the Liberatores, had a financial interest in the project. Tr. 152.

#### **IV. SUMMARY OF HEARING**

##### **A. Applicant’s Case in Chief**

###### 1. Joseph Alfandre:

Joseph Alfandre testified that he is the President of the Kentlands Company and the

developer of the Kentlands community in Gaithersburg, Maryland. He is also partner on the subject project with George Myers, his brother and their firm, GTM Architects of Bethesda. They have also collaborated on other residential projects in Montgomery County.

Mr. Alfandre further testified that Kentlands became a symbol and a development model for a new type of suburban development, “variously referred to as neo-traditionalism, new urbanism, traditional neighborhood development . . . [a]nd . . . smart growth.” According to Mr. Alfandre, the idea behind Kentlands, which continues with the current application, is to locate people within walking distance of jobs and services and to give them a pleasing walking alternative to driving their car.

Mr. Alfandre concluded by stating that “the creativity and excitement of the Silver Spring Central Business District” is what inspired his group to undertake this development. They hoped to be able to bring people to live in close proximity, so they can take advantage of that CBD. Tr. 34-36.

## 2. George Myers:

George Myers testified that he is president of GTM Architects, and is a licensed architect in Maryland, as well as 20 other states. He testified both as a developer in the subject case and as an expert in architecture. Tr. 37-40. Mr. Myers described the subject site and testified that “the goal [of the project] was to try to create a special neighborhood” by improving the streetscape along Georgia Avenue, helping with the gateway effect into Georgia Avenue, and at the same time, providing a good transition back to the existing Woodside neighborhood. Tr. 42-43.

Mr. Myers further testified that he met with the staff of the HPC, the Technical Staff of the M-NCPPC and the Woodside community. As a result, the project went through numerous changes, as shown in Exhibits 43(a) through (f). Tr. 43-49. In the final plan, as shown in Exhibit 43(a), there are no “long sticks” of townhouses facing any of the houses to the west. They are all

single width. The density was pushed to the ends, where it was most appropriate, facing townhouses on the north and a church parking lot on the south.

The HPC was pleased with the changes they had made, and he is comfortable that the project comports with the Master Plan. Tr. 52. Applicant had not originally intended to save the specimen Tulip Poplar on Georgia Avenue, but the environmental staff at M-NCPPC insisted and so the plans were changed. Tr. 52-53. It also created a look more in line with what the HPC wanted.

Mr. Myers then testified to Applicant's commitment to each of the proposed binding elements listed in Exhibit 38. This engendered objections from Martin Klauber, the People's Counsel, who felt that it was inappropriate to apply these detailed binding elements to a schematic development plan. Tr. 60- 75. Mr. Klauber's objections, which are described in Part IV. C., below, resulted in a revised form of Exhibit 38, which can be found in Exhibit 62(a). The binding elements for the SDP on the revised exhibit no longer include elements to which the People's Counsel objected; rather, these elements are listed as commitments to be included in the site plan.

Mr. Myers further testified that the SDP would be corrected to provided for a two foot break in the front building line of each of the six unit sticks, as required by the Zoning Code.<sup>15</sup> Tr. 76. In Mr. Myer's expert opinion, the proposed development is compatible with the surrounding community and will not create any adverse impacts. Tr. 77-78.

On cross examination, Mr. Myers indicated that if the Tulip Poplar were not there, Applicant would have likely added a unit or two in the space, which might have resulted in 5 units on the north and south sticks, instead of 6 units on each. Tr. 79. In Mr. Myer's opinion, Applicant has complied with the Master Plan because all the units on Georgia Avenue face towards Georgia Avenue. Tr. 81.

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<sup>15</sup> The final version of the SDP, contained in Exhibit 62(d), does have the required two foot break .

Finally, Mr. Myers testified that the locations on the subject site with single family detached homes would comply with the R-60 Zone standards.<sup>16</sup> Tr. 90-91.

### 3. Curt Schreffler:

Curt Schreffler testified as an expert in civil engineering. Mr. Schreffler testified that although there is an existing storm drain system, his firm will design a storm water management system covering both quality and quantity control. They will use various methods that are accepted by the State and County, including underground storage for quantity control and filtration systems for quality control. Discharge from these systems will be directed into the storm drain in Georgia Avenue and not towards neighboring properties to the west. Applicant will also push the natural divide on the property further west, so that more water would drain eastward, directly towards Georgia Avenue, rather than the neighborhood. In Mr. Schreffler's expert opinion, there will be less storm drainage to the west following construction of this project than there is at present, and there will be no adverse effects on the surrounding area. Tr. 97-106.

### 4. Dusty Rood:

Dusty Rood testified as an expert in forest conservation. He conducted the initial natural resource inventory and forest delineation approved September 17, 2003 (Exhibit 6). He also submitted a preliminary forest conservation plan and worked with Park and Planning staff on several variations of that plan. Changes were made based on concerns from the neighborhood, historic planning, environmental planning as it related to tree save and the ability of the plan to meet forest conservation requirements. Tr. 121-122.

According to Mr. Rood, the applicable law seeks to preserve existing trees and forest. Park and Planning technical staff identified a 44 inch caliper Tulip Poplar tree located north of Noyes Drive between the duplex and the triplex. Almost immediately south of the intersection between

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<sup>16</sup> Zoning Code §59-C-1.71(a) requires that any "one-family detached" dwelling unit in an R-T Zone be subject to the requirements of the R-60 Zone.



Noyes and Georgia is a Horse Chestnut Tree that was also identified as a priority tree. A third tree that was discussed was a Sugar Maple tree which is located south of Noyes Drive and immediately west of the proposed entrance, between the existing building and the proposed entrance. Tr. 122.

Mr. Rood testified that, generally, larger trees in downtown areas such as this are given higher priority, and Technical Staff determined that the existing forest was below quality and not “worthy of protection.” Within that forest however, is the 44 inch Tulip Poplar tree, and Technical Staff felt strongly that it should be retained and made part of this plan. Tr. 123. The tree was evaluated by Mr. Rood and an arborist who determined the tree was healthy. Mr. Rood concluded that the Tulip Poplar and the Horse Chestnut tree on the southwest corner of Georgia Avenue and Noyes Drives could be preserved using commercially reasonable tree protection measures. Tr. 124-125.

On cross-examination, the People’s Counsel questioned whether other trees could have been saved instead of the Tulip Poplar or whether reforestation of other land could be substituted. Mr. Rood testified, in substance, that it would be very difficult, given the SDP’s layout, to find sufficient other trees to save as a substitute for the 5,500 square feet tree-save credit obtained for the Tulip Poplar, and that the new conservation law which went into effect approximately a year and a half ago mandates the retention of existing forest and trees for single family zones proceeding under the optional method of development. Mr. Rood testified that this requirement generally cannot be waived by the Planning Director. Reforestation is not an acceptable substitute. Tr. 125-136.

#### 5. Craig Hedberg:

Applicant’s traffic engineering expert, Craig Hedberg, testified that using the LATR guidelines, he projected that the new development would produce a net increase in peak hour trips of 9 in the morning and 17 in the evening. Tr. 182-183. When Mr. Hedberg added in the trips which were already being generated by the three homes that will be retained, and took no

deduction for the 2 homes that were to be demolished, the total peak hour trips generated would be 14 in the morning and 22 in the evening. Accordingly, no transportation study would be required to satisfy LATR. Tr. 206-207. These findings are reported in Exhibit 54. Mr. Hedberg also opined that the Applicant's proposals were consistent with the Master Plan and would improve vehicular and pedestrian safety. Tr. 190-191.

At the request of the Woodside Civic Association, Mr. Hedberg also gathered additional data on traffic and pedestrian flow around Georgia Avenue and Noyes Drive. Tr. 183-189. Mr. Hedberg testified that, based on admittedly incomplete data, it did not appear that there was sufficient vehicular or pedestrian traffic to warrant installation of a traffic signal. His analysis is summarized in Exhibit 55.

6. Dave Ager:

Dave Ager testified as an expert in land use planning. He stated that he "had no problem" with Technical Staff's definition of the surrounding area, which included all of Woodside, plus the properties directly across Georgia Avenue from the subject site. Tr. 214. The surrounding area is generally described as R-60, single family detached; however, there are other nearby uses, such as places of worship, Woodside Park and three townhouse developments within the surrounding area.

Mr. Ager further testified that, within the surrounding area, Grace Church Court, the townhouse development furthest to the north, contains approximately 0.8 acres and has 10 townhouse units, giving it a gross density of 12.5 dwelling units per acre. Immediately adjacent to the subject project are the Ottawa Place townhouses. According to Mr. Ager, Ottawa Place is approximately 1.8 acres in size, with 23 dwelling units, which again is a density of approximately 12.5 dwelling units per acre. It has sticks of 2, 3, 4 and 5 townhouses, the 5 townhouse stick being closest to the subject property. To the west, the townhouse community furthest from the

subject site is Greenwood Lane, which has 27 dwelling units on 4.5 acres, with a density of 5.9 dwelling units per acre. Across Georgia Avenue there is a synagogue, two residential lots in the R-60 zone and one vacant lot. Tr. 214-216.

In Mr. Ager's opinion, the proposed development is consistent with the objectives and recommendations of the Master Plan, as set out on page 21. Mr. Ager also opined that the zone requested, as limited by the schematic development plan, is consistent with the recommendations of the Master Plan. Tr. 216-217.

Mr. Ager testified that the proposed rezoning satisfies the purposes and the intent of the RT 12.5 Zone, having a density of 9.7 dwelling units per acre, with 23 townhouses and three single family homes, for a total of 26 dwelling units. The schematic development plan also meets or exceeds the setbacks, green area and coverage requirements of the zone. Tr. 218.

Mr. Ager further testified that the development shown on the schematic development plan will be compatible with the surrounding area and adjacent neighbors. For example, the largest townhouse sticks have been located next to the church to the south and a similar townhouse use to the north. The size and scale of buildings as one gets closer to Noyes Drive have been scaled down to replicate the scale massing of a single family home, and the three single family homes along Noyes Drive are used as a single family detached buffer to the existing neighbors. "So I think it's a correct way to handle the plan that's here." Tr. 219-220.

The intent and purpose of the RT Zone, according to Mr. Ager, is "to provide suitable locations for townhouses that are designated or appropriate residential developments at a density allowed in the RT zone." This particular property, and in general the Georgia Avenue corridor, have been identified in the Master Plan as appropriate for inclusion of townhouses and RT townhouses. Mr. Ager continued, stating that its further intent is to provide amenities normally not found in townhouse zones, and he believes that the amount of green area indicates that

“there's a larger opportunity for parks and pocket parks in this property that wouldn't normally be found in other townhouse zones, but would be found in say a single family detached zone. And the plan outline reinforces that by showing the mews, courts at the intersection of Georgia and Noyes and the infamous Tulip Poplar, a court around there as well.” Tr. 220-221.

On cross-examination, Mr. Ager testified that even without including the three single family homes (and the acreage they sit on) in this project, the total density would be 11.2 dwelling units per acre, well below the 12.5 density maximum. Tr. 224-225.

## **B. Community Response**

### 1. Cheryl Gannon:

Cheryl Gannon testified that she lives at 1507 Noyes Drive, approximately 1½ blocks from the subject site. Ms. Gannon testified to the disturbing history of storm water flooding in her area, and the failure of other developers and the County to provide effective remedies. She is therefore opposed to approval of the subject application until appropriate measures are devised to deal with the problem. As Ms. Gannon put it, “I believe that unless the Council acts responsibly to deny this project or condition it on proposed changes [and] significant investments by the developer on storm water management infrastructure, this disturbing history might repeat itself.” Tr. 112-117.

### 2. Ray Alvarez:

Ray Alvarez of 8909 1<sup>st</sup> Avenue testified that he was speaking on behalf of the “Woodside Community Adjacent Owners in Support of Woodside Courts Project of Noyes Lane LLC.” According to Mr. Alvarez, the Woodside community adjacent owners group is comprised of twelve adjacent and non-adjacent Woodside property owners, whose signatures were submitted with his

written testimony (Exhibit 52).<sup>17</sup> Mr. Alvarez also testified that the Woodside Town Community Association adopted his comments as its own, as confirmed by Mr. Leonard Covello, President of the Board of Directors of that Association, who attended the beginning of the hearing Tr. 6-7. The Woodside Town Community Association is comprised of 24 town homes and a common area located directly adjacent to the northern boundary of the subject property. Tr. 139-141.

Mr. Alvarez further testified that he believed “the applicants have acted in good faith to address our concerns and those of the Historic Preservation Commission and the County Planning Board.” Tr. 142. His group agreed to support the current version of the project based upon certain pledges and commitments by the Applicant. In Mr. Alvarez’s opinion, “the current plan not only addresses our concerns as adjacent property owners, but brings significant benefits to the Woodside community at large . . . . It also complies with the requirements of the various government entities including the County Commission which seek to protect public interest. In short, we believe the current proposal is an excellent compromise.”

Mr. Alvarez testified that benefits of the plan include preservation and renovation of three historic homes, limited height of the proposed development, consultation with the community as to landscaping, fencing and screening materials, reduced density [compared to the original plan], maximum lot coverage of 25 percent of the tract and minimum green area of 60 percent, reduction of the largest unit directly facing adjacent single family owners to a duplex, parking entirely on site, and commercially reasonable efforts by the applicant to install public sidewalk on Noyes Drive to First Avenue and extending on First Avenue to Highland Drive. Tr. 142

According to Mr. Alvarez, the project “will also bring welcome relief from blight to the neighborhood.” Tr. 143. Mr. Alvarez feels that the highest and best use of these Georgia Avenue

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<sup>17</sup> Mr. Alvarez identified the owners of adjacent homes on the list with a single asterisk. It appears that only two of the homes listed were adjacent, his own at 8909 1<sup>st</sup> Avenue and the one next door at 8911 1<sup>st</sup> Avenue. The original members of his group were all adjacent owners and that is how the name of the group originated. The original six were Joyce Hunulla, Joan Warren, Wally Schaeffer, Susan Drumheller, Mary Ann Alvarez and Mr. Alvarez.

properties is not single family residential “since no one is purchasing the properties for that purpose.” In Mr. Alvarez’s words, “the prudent and reasonable solutions of the master plan must be able to be invoked to protect the neighborhood and adjacent owners from harm.” Tr. 144 In his opinion, the opposition amounts to “a collateral attack on the Montgomery County Master Plan,” which should not be allowed.

Mr. Alvarez testified that “the project taken as a whole will be an asset to Woodside, [will] result . . . in the renovation and preservation of historically significant Woodside properties and provide tangible benefits to the community, including those related to safety and well being of all Woodside residents. He completed his direct testimony by urging the Council to favorably consider the applicant's rezoning application for the project. Tr. 146.

On cross-examination, Mr. Alvarez testified that he had heard that Applicant might have an option to purchase Mr. Liberatore’s property for 1.3 million dollars, but he had “no idea whether that is accurate or not.” Tr. 152. Mr. Alvarez also testified that neither he nor anyone else he knew of [other than the Liberatores] had a financial interest in the project. Tr. 152.

### 3. Sarah Brookhart:<sup>18</sup>

Sarah Brookhart testified that she lives at 8825 First Avenue in Silver Spring, and that she and her family are adjacent property owners to this project. She noted that she was also testifying on behalf of her husband, Baird Brookhart, and “several other adjacent property owners who want to indicate that they would like to associate themselves with our remarks.” Mrs. Brookhart referenced statements she and her husband had submitted to Park and Planning expressing concerns and recommendations about the rezoning because “we felt that the proposal was not compatible with the community and we believe there's a direct negative impact on our ability to use and enjoy our property.” Tr. 230-231.

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<sup>18</sup> As mentioned above, the transcript incorrectly identifies this witness as “ Sarah Burkehart.”

Mrs. Brookhart further testified that she had concerns, some of which were raised by others, regarding increased storm water runoff, noise and light pollution, loss of view, traffic, pedestrian safety parking. She also had concerns about the zoning on the single family lots, the historic house that's going to be moved from Georgia Avenue next to her property and about the trees being able to survive the construction. Tr. 231-232. She questioned inclusion of the single family lots in the rezoning and the size of the lots being rezoned diminishing the green space in that area.

Mrs. Brookhart admitted that the single family home adjacent to her in the development will provide some buffer and that she will not have “townhouses right up next to our property line,” but she will still see the townhouses and their lights and hear their equipment. Tr. 233-234. She is “a little skeptical of the County's ability to protect us on some issues, most notably the drainage issues in the area. But, we will go on good faith. We trust this process.”

Finally, Mrs. Brookhart urged that the townhome community known as Woodside Way,<sup>19</sup> not the older Ottawa Place project, be used as a good example of a recent project which included an ample green-space buffer as a result of community input. Tr. 235-236.

#### 4. Cynthia Greer:

Cynthia Greer testified that she has lived in the neighborhood at 8807 Second Avenue for over 10 years and is very concerned about the traffic that may be generated by the project. Tr. 238-248. In Ms. Greer's opinion, Noyes Drive is “particularly ill-suited for increase[d] traffic.” Given the impact of the development of downtown Silver Spring, Ms. Greer “would like the County to really look at limiting entry into the neighborhood via Noyes [Drive].” Tr. 242.

Ms. Greer further testified that there was a 40% increase in traffic along Second Avenue from 2000 to 2003. On cross-examination, she admitted that the proposal for a four way stop at

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<sup>19</sup> The Woodside Way townhome community is located on the western side of the defined surrounding area, between 2<sup>nd</sup> Avenue and 16<sup>th</sup> Street, and marked in green by the witness on Exhibit 59.

Noyes and First Avenue would be a good idea, and Applicant's counsel indicated his willingness to work with the community on traffic calming devices.

5. Susan Stamm, on behalf of the WCA

Susan Stamm testified as President of the Woodside Civic Association (WCA). Initially, she expressed support for installation of four way stop signs at Noyes Drive and 1<sup>st</sup> Avenue. Tr. 253-254. Ms. Stamm then discussed how the WCA has worked with other developers in the past to make proposed townhome projects more compatible with the neighborhood, which now contains approximately 300 homes. There are currently three such projects within the neighborhood, and the addition of 23 townhomes in the proposed project would bring the total number of townhomes to 77. "Each additional development brings a shift in the balance of our neighborhood . . ." Tr. 256.

The WCA met with Applicant in November of 2003, and the membership was quite divided. Ms. Stamm therefore sought to gather information not only from the developer, but also from Technical Staff, the HPC, and the People's Counsel. The Association then sent a letter to Applicant in January of 2004. "Among our major concerns . . . are the overall density, incompatibility, the potential traffic issues, and the massiveness of some of the unit groupings." Tr. 258-259. Applicant did respond to some of their concerns. The WCA then passed a resolution by a vote of 40 to 9, which is attached to the Technical Staff report. As discussed in Part III. K. of this report, the resolution voiced qualified opposition to the proposal.

Ms. Stamm expressed her confusion about why the remaining single-family homes were to be included in the rezoning, and Applicant's counsel explained that the continued existence of those homes was provided for in the binding elements of the SDP. Ms. Stamm also asserted that the WCA still wants the Applicant to remove two additional townhouse units, so the six unit sticks on the north and the south would be reduced to five unit sticks, to make them less massive.



Absent that reduction, Ms. Stamm testified that “I think we would not support the plan.” Tr. 264-265.

Finally, Ms Stamm noted that eight of the 13 people who signed Mr. Alvarez’s letter in support of the project also voted in favor of the WCA resolution referenced above.

### **C. People’s Counsel**

Martin Klauber, the People’s Counsel, did not call any witnesses, but he was a major participant in the hearing. He took strong positions on three issues. First, he opposed any listing of “proffers” on the SDP and any inclusion in the SDP’s binding elements of terms that he felt were more appropriate, under the “Optional Method,” for Site Plan and Subdivision review. Tr. 69-75.

Secondly, Mr. Klauber opposed retention of the specimen tulip poplar tree located on Georgia Avenue because he felt that preservation of this tree made it much more difficult to end up with the best possible development. In fact, he felt strongly enough to characterize his final position on this project as “neither in support of or in opposition to” the application. Tr. 275-279

Thirdly, the People’s Counsel was adamant that item number 5 in Part A of Exhibit 38, a commitment “to preclude non-resident professional offices as special exception use,” could not lawfully be included in the binding elements because it purported to restrict a right granted by statute to apply for a special exception.<sup>20</sup> Tr. 175-178.

### **V. ZONING ISSUES**

Zoning involves two basic types of classifications: Euclidean zones and floating zones. The term “Euclidean” zoning arose from the seminal United States Supreme Court case upholding the land use authority of local governments, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365

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<sup>20</sup> As noted in Part III. E. of this report, the Hearing Examiner does not necessarily agree with the legal position taken by People’s Counsel on this issue (Tr. 175-178), but the question was mooted by Applicant’s decision to withdraw the objected-to binding element.

(1926). Euclidean zoning divides the territory of a local jurisdiction into zoning districts with set boundaries and specific regulations governing aspects of land development, such as permitted uses, lot sizes, setbacks, and building height.

A floating zone is a more flexible device that allows a legislative body to establish a district for a particular category of land use, with regulations specific to that use, without attaching that district to particular pieces of property. Individual property owners may seek to have property reclassified to a floating zone by demonstrating that the proposed location is appropriate for the zone, *i.e.*, it satisfies the purpose clause for the zone, the development would be compatible with the surrounding area, and it would serve the public interest.

Montgomery County has many floating zones, including the R-T Zones. The R-T 12.5 Zone contains development standards and a post-zoning review process that delegate to the Planning Board site specific issues such as building location, stormwater control, vehicular and pedestrian routes, landscaping and screening. The application of the zone to the subject property involves an evaluation of eligibility under the purpose clause, compatibility with existing and planned land uses in the surrounding area, and relationship to the public interest.

#### **A. The Purpose Clause**

The intent and purpose of the R-T Zone as stated in Code §59-C-1.721 is set forth below.

*The purpose of the R-T Zone is to provide suitable sites for townhouses:*

- (a) In sections of the County that are designated or appropriate for residential development at densities allowed in the R-T Zones; or*
- (b) In locations in the County where there is a need for buffer or transitional uses between commercial, industrial, or high-density apartment uses and low-density one-family uses.*

*It is the intent of the R-T Zones to provide the maximum amount of freedom possible in the design of townhouses and their grouping and layout within the areas classified in that zone, to provide in such developments the amenities normally associated with less dense zoning categories, to permit the greatest*

*possible amount of freedom in types of ownership of townhouses and townhouse developments, to prevent detrimental effects to the use or development of adjacent properties in the neighborhood and to promote the health, safety, morals and welfare of the present and future inhabitants of the district and the County as a whole. The fact that an application for R-T zoning complies with all specific requirements and purposes set forth herein shall not be deemed to create a presumption that the resulting development would be compatible with surrounding land uses and, in itself shall not be sufficient to require the granting of the application.*

As is evident from the statutory language, the R-T Zone may be applied (1) in areas that are designated for R-T Zone densities (implying a master plan designation); (2) in areas that are appropriate for residential development at densities that are allowed in the R-T Zones; or (3) where there is a need for buffer or transitional uses. The present application clearly satisfies the first (and probably the second) of these alternatives, in that the Master Plan expressly identifies “the possible development of townhouses along Georgia Avenue” using the R-T Zone (see discussion in Part III. F. of this report).

The surrounding area, which has a mixture of residential and institutional uses, appears to be quite suitable for townhouses because there are townhouses immediately to the north and a church and its parking lot immediately to the south. Tr. 214-221. Only in those locations does Applicant plan groupings of more than three townhouses. On the west side of the development, where there are adjacent single-family homes in the R-60 Zone, there will be only groupings of two townhouses, the retained single family homes and the ends of the north and south groupings. In addition, Applicant has agreed to provide landscaping and screening “to provide an appropriate buffer between the project and adjacent single-family residential neighbors.” (Exhibit 62(a), ¶B.4.) Thus, the appearance to the adjacent homes will not be a massive front of townhouses, and the proposed townhouse use would be fully compatible with existing uses on the west side of the Georgia Avenue in terms of both use and density.

The same can be said with regard to the impact of the proposed development upon the uses directly across Georgia Avenue, to the east, where there are two single family homes and a synagogue. As is evident from the SDP, there will be a great deal of open space facing Georgia Avenue, including a park-like area around the specimen Tulip Poplar and green space on either side of Noyes Drive. Facing Georgia Avenue, there no groupings of townhouses exceeding three in number, except for the ends of the north and south groupings. Moreover, the impact on single-family homes on the east side of Georgia Avenue will be reduced by Georgia Avenue itself, which is a seven-lane, divided highway in this area and is recommended for a 120-foot right-of-way. For all of these reasons, the Hearing Examiner concludes, based on the preponderance of the evidence, that the subject property is appropriate for residential development at densities allowed in the R-T 12.5 Zone.

The proposed development, which includes 23 townhomes and three pre-existing single family homes, will fit well into the residential character of this neighborhood. Moreover, as noted by Technical Staff, there is little developable land in the surrounding area. Given the present mix of 74% single-family homes and 26% townhouses among the residential uses found in the surrounding area, the proposed development would be compatible with existing, as well as planned uses.

In addition to visual effects of the proposed development, neighbors expressed concerns about stormwater drainage and possible traffic. These issues were discussed at some length in Part III. K. of this report. Both of these issues will be addressed in detail at site plan and subdivision, but as noted above, the evidence in this case supports the conclusion that Applicant will improve the stormwater run-off problem , not make it worse (see page 30, above), and that the traffic generated will be well within county standards (see pages 23-24, above). Moreover, Applicant has agreed to support a number of traffic calming and safety measures (Exhibit 62(a)).

Accordingly, the evidence demonstrates that the proposed rezoning and development would be consistent with the intent of the R-T Zone to prevent detrimental effects to adjacent properties and to promote the health, safety, morals and welfare of the present and future inhabitants of the district and the County.

### **B. Compatibility**

An application for a floating zone reclassification must be evaluated for compatibility with existing and planned uses in the surrounding area. For the reasons discussed in the previous section, the Hearing Examiner agrees with the findings made by the Planning Board and Technical Staff that the proposed reclassification to the R-T 12.5 Zone and the development proposed would be compatible with existing and proposed development in the surrounding area.

Technical Staff summarized this point well:

[The proposed development] is compatible with the surrounding mix of one family detached and attached dwellings. As proposed, the mixed residential development would serve as a transition from one family detached dwellings to Georgia Avenue. The effective density accomplished is less than ten units to the acre. This reflects design discussions with staff and citizens, the applicant's responsiveness to environmental, historic preservation and efforts to accomplish the most harmonious design. The applicant met with the Woodside Civic Association and reduced the initial proposal of 30 units to 26 units, partially in response to their concerns regarding density and proximity. This flexibility is desirable for an infill development, such as the subject proposal.

### **C. Public Interest**

The applicant must show that the proposed reclassification bears sufficient relationship to the public interest to justify its approval. The State Zoning Enabling Act applicable to Montgomery County requires that all zoning power must be exercised:

*“ . . . with the purposes of guiding and accomplishing a coordinated, comprehensive, adjusted, and systematic development of the regional district, . . . and [for] the protection and promotion of the health, safety, morals, comfort, and welfare of the inhabitants of the regional district.”*

*[Regional District Act, Maryland-National Capital Park and Planning Commission Article (Art. 28), Md. Code Ann., § 7-110].*

When evaluating the public interest, the District Council normally considers master plan conformity, the recommendations of the Planning Board and Technical Staff, and any adverse impact on public facilities. The Planning Board and Technical Staff opined that the proposed development would substantially comply with the Master Plan, and the Hearing Examiner agrees. The Master Plan designates Georgia Avenue in this area as the potential location for townhouses in the R-T Zone and recommends the “optional method,” which has been employed in this case. The proposal also comports with all the specific guidelines set forth on page 21 of the Master Plan, thus preserving the residential character of the area, as discussed in Part III. F. of this report.

The impact on public facilities has been discussed in Part III. H. of this report. The evidence indicates that, although the local high school experiences some overcrowding and is expected to do so for the next several years, the County Council made the judgment in the current AGP Policy Element that adequate school capacity exists in the planning area. Moreover, the 26 dwelling units proposed here are expected to generate only five high school students. Under these circumstances, the minimal evidence of possible school overcrowding is not sufficient to warrant denial of the application.

The evidence also supports the conclusion that the impact on local traffic from this development would be minimal and would be ameliorated by the traffic calming and safety measures sought by Applicant and the neighbors. No evidence was presented to suggest that the proposed development would have any adverse effect on utilities or other public services.

For all of these reasons, the Hearing Examiner concludes, based on the preponderance of the evidence, that the proposed reclassification and development would have no adverse effects on public facilities that warrant denial of the application.

## VI. CONCLUSIONS

Based on the foregoing analysis and after a thorough review of the entire record, I reach the following conclusions:

1. The application satisfies the requirements of the purpose clause;
2. The application proposes a form of development that would be compatible with existing and planned land uses in the surrounding area;
3. The requested reclassification to the R-T 12.5 Zone bears sufficient relationship to the public interest to justify its approval.

## VII. RECOMMENDATION

I, therefore, recommend that Zoning Application No. G-817, requesting reclassification from the R-60 Zone to the R-T 12.5 Zone of 2.7 acres of land known as Parts of Lots 1 - 4, Block 4, and Parts of Lots 7-11, Block 3, in the Woodside Subdivision (13<sup>th</sup> Election District), and located at 9012, 9008 & 9006 Georgia Avenue and 1403 Noyes Drive in Silver Spring, be **approved** in the amount requested and subject to the specifications and requirements of the final Schematic Development Plan, Ex. 62(d); provided that the Applicant submits to the Hearing Examiner for certification a reproducible original and three copies of the Schematic Development Plan approved by the District Council within 10 days of approval, in accordance with §59-D-1.64 of the Zoning Ordinance.

Dated: September 8, 2004

Respectfully submitted,

Martin L. Grossman  
Hearing Examiner